118 (1) No. 08- 08-985 JAN 30 2009

Supreme Court of the United States

COUSHATTA TRIBE OF LOUISIANA,

Petitioner,

v.

MEYER & ASSOCIATES, INC. and RICHARD MEYER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dicta from this Court's previous decisions suggest that state courts are required to defer to tribal courts for an original determination of jurisdiction, yet there has been no explicit holding from this Court on the issue. The state courts have split on whether they are bound to follow the same analysis as the federal courts when Indian tribes appear before them with issues of tribal law, and therefore these are the questions presented.

1. Are state courts required to apply and follow the Tribal Exhaustion Doctrine, and, in this case, should the Louisiana Supreme Court have given the Coushatta Tribal Court the first opportunity to interpret Coushatta law?

2. Can a Native American Tribe be forced to litigate claims in a state court when an ostensible waiver of sovereign immunity is not valid under that tribe's law?

LIST OF PARTIES

The Petitioner, The Coushatta Tribe of Louisiana, is a federally-recognized Indian Tribe. Petitioner was Defendant/Appellant below.

The Respondents, Meyer & Associates, Inc. and Richard Meyer, individually were Plaintiffs/Appellees below. Meyer & Associates, Inc. is a Louisiana corporation, and Richard Meyer is a citizen of the State of Louisiana.

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OPINIONS BELOW

Petitioner, Coushatta Tribe of Louisiana, prays that a writ of certiorari issue to review the judgment below.

The opinion from the highest state court to review the merits appears at Appendix A to the petition and is reported at *Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana*, 2007-2256 (La. 9/23/08), 992 So.2d 446.

The opinion from the appellate court, the Third Circuit Court of Appeal, appears at Appendix B to the petition and is reported at *Meyer & Associates, Inc. v. Coushatta Tribe of Louisiana*, 2006-1542 (La. App. 3d Cir. 8/8/07), 965 So.2d 930.

The opinion of the District Court for the Parish of Calcasieu appears at Appendix C to the petition, and this decision is unpublished.

JURISDICTION

The opinion of the Louisiana Supreme Court was entered September 23, 2008, and the request for rehearing by the Coushatta Tribe of Louisiana was denied on November 10, 2008. Appendix D to the petition. This Court's jurisdiction to consider this petition from the final judgment or decree by the highest court of the state in which the decision could be had is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8, Clause 3 of the United States Constitution:

> "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Article VI, Clause 2, of the United States Constitution:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby. . . ."

Coushatta Judicial Code § 1.2.08, which provides a ranking of applicable laws. Appendix G.

Coushatta Judicial Code § 1.1.05, which describes the methods of waiving sovereign immunity. Appendix G.

STATEMENT OF THE CASE

Preliminary Statement

This case challenges the refusal of the Louisiana Supreme Court to defer to the Coushatta Tribal Court on an important issue of Coushatta Tribal law. The Coushatta Tribe of Louisiana (the "Coushatta Tribe") is a sovereign nation. It is a federally-recognized Native American Indian tribe that has its tribal offices in Elton, Louisiana. This case involves a series of contracts between the Coushatta Tribe and Meyer Associates, Inc. and that company's principal, Richard Meyer (collectively "Meyer"). The issues before this Court center on the legality of an ostensible waiver of sovereign immunity by the Coushatta Tribe's Chairman, Lovelin Poncho. The issues in the case are solely determined by federal and tribal law.

Background Facts

The Coushatta Tribe owns and operates a land-based casino in Kinder, Louisiana. Meyer approached the Tribe and successfully pitched the idea of a Coushatta-owned and operated power plant as an alternative source of revenue to the Tribe. The power plant would be located on Coushatta land, and it would be built by Meyer's company. Meyer drafted contract documents and drafted a resolution for the Tribal Council to approve.[1]

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[1] The Coushatta Tribal Council consists of four elected council members and a separately-elected Tribal Chairman. (Cont'd)

Coushatta Resolution 2003-04, dated January 14, 2003, authorized Meyer to move forward with the power plant project. It also authorized the Chairman (or his designee) to "negotiate and execute all necessary Agreements with Meyer and Associates, Inc. . . . as may be required. . . ." The resolution does not authorize the Chairman to waive sovereign immunity.

Through a series of amendments to the original contract, the Chairman purported to commit the Tribe to (1) arbitration of contract disputes, then (2) litigation in Allen Parish courts (where the Tribe is located) and then (3) litigation in Calcasieu Parish (Meyer's home parish). In 2005 there was a change in the makeup of the Tribal Council. The newly-elected Council decided that the Tribe had paid Meyer millions of dollars, yet Meyer had not delivered any work product. The Tribe sued Meyer in Tribal Court to rescind the contracts, and Meyer responded by later filing suit against the Tribe in state district court in Calcasieu Parish.

The Coushatta Tribe excepted to the jurisdiction of the state court suit, and moved to have that suit dismissed on the basis of the Tribe's sovereign immunity. Alternatively, the Tribe asked the court to send the matter to the Tribal Court for an interpretation of Coushatta law, and for a determination of whether

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(Cont'd)

Kevin Sickey is the current Chairman. The Council performs the traditional functions of the legislative and executive branches of government. There is a separate and independent Tribal Court system, which consists of a trial court and a separate three-judge court of appeals.

the waiver of sovereign immunity in one of the contract amendments was valid under Coushatta law. The district court denied the Tribe's exceptions. *See* Appendix C.

The Tribe timely filed a request for a writ of review to the Third Circuit Court of Appeal. That intermediate appellate court granted the writ, and entered a stay order until such time as the Coushatta Tribal Court could rule on the validity of the waiver of sovereign immunity. *See* Appendix B.

In turn, Meyer requested that the Louisiana Supreme Court review that decision. The Supreme Court, in a 4-3 split decision, found that the state court had jurisdiction over the Tribe, and the court refused to defer to the Tribal Court's determination of Coushatta law. Appendix A. That court refused to grant a request for rehearing, and issued its denial on November 10, 2008. The opinion of the highest Louisiana court is contrary to federal law and jurisprudence, and forms the basis for this petition.

REASONS FOR GRANTING THE PETITION

1. The Tribal Exhaustion Doctrine should apply to issues of tribal law when Native American tribes are sued in the state courts as a matter of substantive federal law.

Suits against the Coushatta Tribe are barred by sovereign immunity unless that immunity is explicitly waived. *See e.g. Okla. Tax Comm'n v. Citizens Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909 (1991). "[T]ribal immunity is a matter of federal law and is not subject to diminutive by the States." *Id.* at 756. Federal law, not state law, provides the standard for determining whether a waiver is sufficiently explicit. *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1703 (1998). "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories. Suits against Indian tribes are thus barred by sovereign immunity absent a **clear waiver by the tribe** or congressional abrogation." *Id.* (emphasis added).

This Court has previously addressed the issue of the "explicitness" of written waivers of sovereign immunity. The determination of whether a waiver is "explicit" is pointless if the authority for a written waiver is lacking. The Court has not given guidance to the lower courts (or the state courts) on the issue of challenges to the validity of waivers of sovereign immunities under

tribal law.[2] Furthermore, the federal courts have considered and applied the Tribal Exhaustion Doctrine, but the state courts are split on the issue of whether they must follow this jurisprudential rule. *See* Section 2, *infra*. This Court should rule on this issue, and require state courts to follow the same rule of deference to tribal court interpretations of tribal law that it requires of the federal courts. If not, Native American tribes will be subject to suits in the state courts where they would not otherwise be subject to suit, and they will face the prejudices that exist in courts unfamiliar with tribal laws and customs.

Sovereign immunity cannot be waived by unauthorized acts of officials. *U.S. v. U.S.F.&G.*, 309 U.S. 506, 513 60 S.Ct. 653, 657 (1940). In *U.S.F.&G*, this court held:

> It is a corollary to immunity from suit on the part of the United States and the Indian Nations in tutelage that this immunity cannot be waived by officials. If the contrary were true, it would subject the government to suit in any court in the discretion of its responsible officers. This is not permissible.

Id. The validity of the Chairman's attempted waiver of immunity is uniquely a question of Coushatta tribal law

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[2] Although the express nature of the "Governing Law" language in one of the contract amendments is not the issue, the Tribe continues to reserve its rights to dispute to the breath of such language and whether it applies prospectively to agreements not then in existence.

because there is no body of law establishing uniform rules of authority for Tribal officials. *See World Touch Gaming v. Massena Mgt.*, 117 F.Supp.2d 271, 275 (N.D. N.Y. 2000) (holding that waiver of tribal sovereign immunity is invalid when contrary to the tribe's constitution and judicial code). This Court should grant the Coushatta Tribe's petition and review this important issue of tribal law and tribal sovereignty, which **impacts all Native American tribes.**

The Louisiana Supreme Court dodged the issue of whether the waiver was legal under Coushatta law, and jumped to the conclusion that the waiver was valid. In fact, the ruling indicates that the state courts are not *required* to follow the federal rule of deference to tribal courts on issues of tribal law:

> As related by the court of appeal, the *United States Supreme Court has **never** held that the exhaustion of tribal remedies doctrine applies to the states.* If we assume that the doctrine does apply to state courts, it is axiomatic that the jurisdiction of the state court must be determined prior to the doctrine's application. The doctrine applies only when a federal court (or hypothetically, here, a state court) and a tribal court share jurisdiction. The doctrine mandates that a court *with* jurisdiction allow a tribal court which may have jurisdiction to determine its own jurisdictional question. . . . [T]he doctrine does not mandate that tribal courts be allowed to determine whether or not non-tribal courts have concurrent jurisdiction.

Appendix A at pp. 6a-7a (emphasis added). The Louisiana Supreme Court determined that the state courts had jurisdiction over the Coushatta Tribe (based on the contractual language) and then refused to follow the Tribal Exhaustion Doctrine.[3] That court interpreted and applied Coushatta law, rather than sending the issue to the Tribal Court. With all due respect, the court got it wrong. Because this is a federal issue, the court should have followed federal law and jurisprudence.

As part of its decision to refuse to follow the Tribal Exhaustion Doctrine, and in finding the waiver of sovereign immunity to be valid under Coushatta law, the Louisiana Supreme Court interpreted and applied Tribal Code § 1.1.05[4] differently from the Coushatta Tribal Court:

> Here, the Tribal Council's restriction of its wording to "[n]othing in this Code" makes clear that the codal (sic) article applies only to the language of the Code, and not to waivers extraneous to the Code.

Appendix A at p. 10a. The issue was whether Section 1.1.05 described the only ways that the Tribal Council

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[3] The "Tribal Exhaustion Doctrine" is shorthand for the Court's holding in a line of cases, including *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971 (1987), which requires federal courts to require that parties exhaust their remedies in the tribal court system before the case can be heard in federal court, where the adjudication of issues in federal court could infringe upon tribal law making authority.

[4] The complete text of this law is found in Appendix G.

could waive sovereign immunity. The Louisiana Supreme Court's interpretation would mean that Section 1.1.05 does not contain a requirement that waivers of sovereign immunity be specific, or that they be accomplished through a resolution or ordinance. That law reads, in part:

> The Coushatta Tribe of Louisiana, as a sovereign government, is absolutely immune from suit. . . . Nothing in this Code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Council specifically referring to such.

The Louisiana Supreme Court's interpretation is contrary to the Tribal Court's interpretation of that same statute in the case of *Celestine v. Coushatta Tribe of Louisiana*, Appendix E, at p. 64a.

Mr. Celestine had an employment contract that contained a waiver of sovereign immunity, yet there had been no proper authorization for the waiver. Judge Little found that sovereign immunity protected the Tribe and dismissed the suit:

> There is however, no specific resolution or ordinance approved by the Tribal Council that waives sovereign immunity as to the employment contract with Mr. Celestine. Case law in other jurisdictions may provide for implicit waiver, but there is no Coushatta

> authority that trumps or refines the specific requirement for a specific ordinance or resolution.

Celestine, Appendix E at p. 66a.[5]

The majority opinion below, hypothetically assumes that both the state and tribal courts would have jurisdiction over the matter.[6] The court then jumped to the conclusion that the immunity waivers were valid based on general language in Resolution 2003-04. "[T]he Tribe validly executed waivers of sovereign immunity and expressly subjected itself to the jurisdiction of the district court. . . ." Appendix A at p. 10a. The court came to that conclusion even though there is no specific authority for the waivers. The contracts at issue are not mentioned in Resolution 2003-04 and the words "waiver" and "sovereign immunity" are not to be found in that resolution.

This is exactly the type of problem that the Tribal Exhaustion Doctrine is designed to prevent–state courts

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[5] This jurisprudential authority was provided to the Louisiana Supreme Court, yet the opinion is not referenced by any of the Justices in the majority or minority opinions.

[6] A proper analysis of tribal court jurisdiction would have required application of the facts in *Montana v. U.S.*, 450 U.S. 544, 101 S.Ct. 1245 (1981), all of which would have led to the conclusion that the Coushatta Tribal Court had subject matter and personal jurisdiction over this case.

bastardizing tribal law to force litigation in the state courts.

> "[T]he existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions."

Natl. Farmers Union Ins. Cos. v. Crow Tribe of Indians, 471 U.S. 845, 855-56, 105 S.Ct. 2447, 2453-54.

The analysis by the Louisiana Supreme Court should have been:

1. Does the Tribal Court have jurisdiction over these parties and this matter?

   The answer is "yes," according to the application of *Montana v. U.S.*, 450 U.S. 544, 101 S.Ct. 1245 (1981):

   A. "[T]ribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter **consensual relationships** with the tribe or its members,

through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565 (emphasis added).

B. "[A] tribe may also retain inherent power to exercise civil authority over the **conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on** the political integrity, the **economic security**, or the health or welfare **of the tribe**." *Id.* (emphasis added).

2. Since the Tribal Court has jurisdiction over the case, does the case involve important issues of tribal law, government, and sovereignty?

The answer is "yes," because the issue of tribal sovereignty is one of utmost importance to the Tribe and its government. *Natl. Farmers*, 471 U.S. 845; 105 S.Ct. 2447 (1985).

A. The question of whether the Tribal Court has jurisdiction is a question of federal law. *Id.* 471 U.S at 852, 105 S.Ct. at 2452.

B. The Louisiana Supreme Court should be bound by the Supremacy Clause to follow federal law on the

issue of the Tribal Exhaustion Doctrine. U.S. Const. Art. VI, cl. 2.

C. Congress has a policy of supporting **tribal self-government and self-determination** which the Louisiana Supreme Court has violated. *Natl. Farmers*, 471 U.S. at 851, 102 S.Ct. at 241.

D. "We believe that examination [of jurisdiction] should be conducted in the first instance in the Tribal Court itself." *Id.* 471 U.S. at 856, 105 S.Ct. at 2454; "Exhaustion of tribal court remedies, moreover, will encourage tribal courts to explain to the parties the precise basis for accepting jurisdiction, and will also provide other courts with the benefit of their expertise in such matters in the event of further judicial review." *Id.* 471 U.S. at 857, 102 S.Ct. at 2454.

The Louisiana Supreme Court engaged in a self-centered analysis, that did not take into account federal law or policy.[7] That analysis consisted of:

1. Do the Louisiana Courts have jurisdiction over the Tribe?

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[7] It was apparent that no consideration was given to the fact that the Coushatta Tribe's suit in the Coushatta Tribal Court was the first-filed suit.

> They answered that question in the affirmative, based on their own interpretation of Coushatta law on the issue of the waiver of sovereign immunity, and ignoring Coushatta Tribal Court jurisprudence.
>
> 2. The Louisiana courts have jurisdiction over the Tribe because sovereign immunity was validly waived under Coushatta law.

Again, that analysis is flawed, because it is contrary to the prior rulings of this Court, it violates federal law and policy, and it deprives the Coushatta Tribe of the right to have its laws interpreted by the Coushatta Tribal Court. This Court should grant the petition, review this issue, and order the Louisiana Supreme Court to follow federal law and policy, and reverse its erroneous ruling.

2. The State courts have inconsistently ignored, recognized and applied the Tribal Exhaustion Doctrine.

Multiple state supreme courts have addressed the application of the Tribal Exhaustion Doctrine in state court. The majority of these cases suggest that states are bound to follow this federal doctrine. The courts that have determined otherwise base this determination on the particular facts of the case, usually because a tribe itself is not a party, tribal interests are not implicated,

or the subject matter of the suit did not occur on tribal land.[8]

If this petition is granted, this Court will have the opportunity to require the state courts to follow federal law and policy as applied to Indian tribes, and the state courts are in need of guidance. Although dicta from this Court's previous decisions suggest that state courts are required to defer to tribal courts for an original determination of jurisdiction, there has been no explicit holding from this Court on the issue.[9] The same interests that compel federal courts to apply the Tribal Exhaustion Doctrine equally compel a similar result in state courts.

A review of state court decisions reveals that the treatment of Tribal Exhaustion is not uniform. This means that Indian Tribes in one state are treated differently that those in another state based on different interpretations of substantive federal law.

An Indian Tribe in Connecticut will be afforded the opportunity of exhausting its remedies in Tribal Court before being required to proceed in state court. *Drumm v. Borwn*, 245 Conn. 657, 681, 716 A.2d 50, 62-62 (1998).

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[8] In the instant case, the Tribe is a party to the contract and the lawsuit, and the contract was to be performed on tribal land.

[9] This Court has held the Tribal Exhaustion Doctrine applies to "non-tribal courts." Some state courts have interpreted this to be a clear indication that the doctrine must be followed by state courts. *See Iowa Mut.*, 480 U.S. 9, 107 S.Ct. 971 (1987).

The Connecticut Supreme Court, after an extensive discussion of this Court's cases dealing with Tribal Exhaustion, had the following to say about the doctrine's application in state court:

> The Supreme Court cases do not conclusively indicate that the exhaustion rule is substantive federal law, which is binding in state courts pursuant to the supremacy clause of the federal constitution, as opposed to merely a federal procedural rule that is based upon, but separate from, the substantive legal strictures embodying the federal policy of supporting tribal self-government. Nevertheless, there are strong suggestions that the rule is substantive in nature.

Drum, 245 Conn at 681. These "suggestions" include this Court's repeated use of language suggesting the policy of promoting tribal self-government *compelled* the adoption of the doctrine. *Id, citing, Iowa Mut.*, 480 U.S. at 15-16, 107 S.Ct. at 976-977. The Connecticut court noted that in *Iowa Mut.* this Court explained the importance of allowing tribal courts to adjudicate, without interference, matters over which they properly are exercising jurisdiction, stating, "[a]djudication of such matters by *any* non-tribal court . . . infringes upon tribal law making authority." *Id, citing and quoting, Iowa Mut.*, 480 U.S. at 16, 107 S.Ct. at 977 (emphasis added). This Court should hold that the rule of deference to Tribal Courts, in this case and in similar cases, applies equally to state and federal courts as a matter of federal law. This is the only way that the

federal policy of Indian self-governance and self-determination can survive.

New York courts have also indicated a willingness to apply the Tribal Exhaustion Doctrine in state court. In *Seneca v. Seneca*, 293 A.D. 2d 56, 741 N.Y.S.2d 375, the court concluded that the doctrine did not apply because no action was pending in Tribal Court. "[W]e conclude that [the Tribal Exhaustion Doctrine] does not apply *because* there is no action pending in a Seneca Nation tribal court." *Id.* at 60, 379 (emphasis added). This suggests that had a case been pending in Tribal Court, New York would have applied the doctrine.

Wisconsin has also favorably addressed the issue of applying the doctrine in state court. *Teague v. Bad River Band of Lake Superior Tribe of Chipewa Indians*, 665 N.W.2d 899, 265 Wis.2d 64 (Ct. App. 2002). "The principles of comity applicable to state court-tribal court relations are built upon the goal of fostering tribal self-government through recognition of tribal justice mechanisms." *Id.* 665N.W.2d at 919, 265 Wis.2d at 104 (concurring opinion). "Consequently, the plaintiff's choice of forum and the application of state law are *outweighed* by the fact that the litigation involves tribal sovereignty and the interpretation of tribal law, and that the material events occurred on tribal land." *Id* (emphasis added).

Arizona has declined to apply the Tribal Exhaustion Doctrine in state court. *Astorga v. Wing*, 211 Ariz. 139, (App. 2005). The court stated, "the principle of exhaustion recognized by federal courts *in this context* does not similarly operate in Arizona state courts."

Id. at 142 (emphasis added). The "context" in *Astorga* is that an Indian plaintiff filed suit in state court against a non-Indian defendant. *Id.* at 143. Therefore, Tribal Exhaustion was not applicable. However, the court in *Astorga* does state in dicta that "[u]nlike Arizona state courts, federal courts retain the power to review an Indian court's exercise of jurisdiction over non-members. *Id.* at 142. "Thus, the relationship between Navajo courts and the federal courts is (at least in part) a vertical one, governed by the rule of exhaustion." *Id.* Although this vertical versus horizontal relationship may be a distinction, there is nothing suggesting this distinction is dispositive of the inquiry. In fact, the cases cited above indicate that state courts have the same interest in favoring tribal self-government, yet a state court's refusal to apply the Tribal Exhaustion Doctrine would undermine these federal interests. The state and federal courts should have the same policy regarding this federal issue.

The Oklahoma appellate court indicated in dicta that "the exhaustion doctrine does not apply in state court actions." *Michael Minnis & Assoc., P.C. v. Kaw Nation*, 90 P.3d 1009, 1014 (Ok. App. 2003). However, in that case, the court concluded that the Kaw Nation had sovereign immunity from suit in state court. *Id.* at 1015. Thus, any application of the Tribal Exhaustion Doctrine was moot.

Cases from state courts around the country indicate the lack of a uniform treatment of Native American Tribes in the state courts. If courts, like the Louisiana Supreme Court, refuse to defer to the tribal courts for the interpretation and application of tribal law, tribal sovereignty will be jeopardized and eroded, and the

federal policies of self-government and self-determination will not be followed. The United States Constitution makes federal law supreme, and this Court should insist that the state courts follow federal law and policy. The ruling of the Louisiana Supreme Court should be reversed, and the case sent back to Coushatta Tribal Court for the interpretation and application of Coushatta law on the issue of whether there was a valid waiver of sovereign immunity by the former Chairman.

3. The Louisiana Supreme Court incorrectly interpreted and applied Coushatta law.

Coushatta Tribal Code § 1.1.05 requires that waivers of sovereign immunity must be in the form of a resolution or ordinance, and there is a requirement that the waiver be specific. As noted above, the Coushatta Tribal Court in *Celestine v. Coushatta Tribe of Louisiana*[10] interpreted this law to require a specific resolution or ordinance relating to a specific contract for there to be a valid waiver. In *Celestine*, the plaintiff was an employee of the Tribe, and the former Chairman, Lovelin Poncho, had signed an employment contract between the Tribe and Celestine shortly before Poncho left office. The Coushatta Tribal Court found that sovereign immunity had not been properly waived, and dismissed Celestine's case.

The Louisiana Supreme Court completely ignored this jurisprudence, and gave a different interpretation to the statute. Even though the words "sovereign immunity" are not contained in the authorizing

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[10] Appendix E, at p. 64a

resolution, that court found that Lovelin Poncho had been granted a general authority that would include waiving sovereign immunity.

The state court determined that it had jurisdiction over the Coushatta Tribe, even though the waiver of sovereignty did not comport with Coushatta law.

> "The federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute. '[A]bsent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them.'"

Iowa Mut., 480 U.S. at 14, 107; 107 S.Ct. 971, 975 (1987), *quoting Williams v. Lee*, supra, 358 U.S. 217, 220, 79 S.Ct. 269, 271 (1959). This ruling by the Louisiana court violates the Coushatta Tribe's right to make its own laws and to be governed by them. The ruling below should be reversed.

CONCLUSION

The Coushatta Tribe of Louisiana enjoys sovereign immunity, and it cannot be sued unless it legally waived sovereign immunity. In this case, the Louisiana Supreme Court interpreted and applied Coushatta law, ignored Coushatta Tribal Court jurisprudence, and concluded that sovereign immunity was legally waived. The Coushatta Tribal Court was not given the opportunity to rule on this important issue of

sovereignty and jurisdiction. The Louisiana Supreme Court decided that it could perform its own ad hoc interpretation of tribal law, and it got the wrong answer.

This Court should hold, as a matter of federal law and policy, that the state courts should defer to tribal court interpretations of tribal law when an Indian party is a tribe and where tribal autonomy is at stake. This federal policy of tribal self-governance has been violated by the Louisiana court. A writ from this Court will settle the uncertainty and inconsistent application of federal law and policy in the state courts. The Constitution makes federal law supreme, and this case, as it currently stands, is contrary to federal law, as pronounced by this Court. The case below should be reversed, and the case remanded with instructions to have the Coushatta Tribal Court determine whether sovereign immunity was legally waived, under Coushatta law.

WHEREFORE, the Coushatta Tribe of Louisiana prays that the Court grant its petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF LOUISIANA FILED SEPTEMBER 23, 2008

SUPREME COURT OF LOUISIANA

No. 2007-CC-2256.

MEYER & ASSOCIATES, INC.

v.

COUSHATTA TRIBE OF LOUISIANA.

Sept. 23, 2008.

Rehearing Denied Nov. 10, 2008.

TRAYLOR, J.

We granted this writ application to determine whether the court of appeal erred in reversing the judgment of the trial court. For the reasons which follow, we reverse the ruling of the court of appeal and reinstate the judgment of the trial court.

FACTS and PROCEDURAL HISTORY

In December of 2001, the Coushatta Tribe of Louisiana ("CTOL" or "the Tribe"), a federally recognized Indian Tribe, entered into an "Agreement for Professional Services" with Meyer and Associates, Inc. ("Meyer"), for general engineering and

construction services. This contract, signed by Lovelin Poncho, then the Chairman of the Coushatta Tribal Council, provided that the contract would be governed by the laws of the State of Louisiana, that any disputes would be settled by binding arbitration according to the rules of the American Arbitration Association, and that the arbitration would be enforced in the Tribal Court.

Some time later, Meyer and the Tribe decided to jointly develop an electric power plant. The development, as contemplated, would involve major financial investments from businesses, cooperatives, and municipalities. On January 14, 2003, the Tribal Council passed Resolution 2003-04, authorizing the Chairman to negotiate and execute all necessary agreements with Meyer as may be required to enable the complete development and implementation of the power program, as well as to negotiate and execute necessary memorandums of agreement (MOA) with various companies and municipalities as may be necessary to develop and implement the program. R. at 98-105.

During the same period of time, the Tribe, through Chairman Poncho, and Meyer entered into an "Interim and Definitive Supplemental Agreement to Existing Agreement for CTOL Power Program," which modified the original "Agreement for Professional Services." This interim agreement was executed "with Effective Date of CTOL Resolution 2003-04 or January 14, 2003." R. at 114. The interim agreement stated, among other things, that the two agreements and "amendments thereto shall be interpreted, governed and construed

under the laws of the State of Louisiana without regard to applicable conflict of laws provisions," that the Tribe "irrevocably consent[ed] to the jurisdiction of the courts of the State of Louisiana," that "any dispute arising hereunder shall be heard by a court of competent jurisdiction in the Parish of Allen, or any other Parish mutually agreed to," and that the "CTOL, specifically waives any rights, claims, or defenses to sovereign immunity it may have as it relates to this Agreement except this waiver is limited at this time to Development Phase 2 Services." R. at 113-14.

Between April and September 2003, the Tribe executed memorandums of understanding (MOU) with Valley Electric Membership Cooperation ("Valley") and the cities of Natchitoches, Minden, and Ruston, Louisiana. The Valley MOU contained a forum selection clause agreeing that disputes would be litigated in a court of competent jurisdiction in Natchitoches Parish, Louisiana, and a waiver of the Tribe's sovereign immunity. The remaining MOU's contained similar forum selection clauses indicating that disputes would be litigated under the laws of the State of Louisiana in courts of competent jurisdiction in appropriate venues, as well as waivers of sovereign immunity.

In June of 2005, the Tribe elected a new Tribal Council and Chairman.

On April 21, 2006, the Tribe filed suit in Tribal Court against Meyer for damages related to the various contracts. On June 9, 2006, Meyer filed suit against the

Tribe in the Fourteenth Judicial District Court for breach of contract. On July 7, 2006, the Tribe filed Exceptions of Lis Pendens and Lack of Subject Matter Jurisdiction in the district court. The district court denied the Exception of Lis Pendens on October 31, 2006, and on November 6, 2006, the district court denied the Exception of Lack of Subject Matter Jurisdiction. On August 8, 2007, the court of appeal applied the federal exhaustion of tribal remedies doctrine and stayed the matter, determining that the district court should have allowed the Tribal Court the opportunity to decide whether the Tribe had waived its sovereign immunity. This Court granted writs in order to determine the propriety of the court of appeal's ruling.

DISCUSSION

The issues before the Court are twofold: (1) Whether the district court should have stayed this matter in accordance with the exhaustion of tribal remedies doctrine in order to allow the Tribal Court to decide whether the Tribe had waived its sovereign immunity, and (2), if not, whether the Tribe waived its sovereign immunity such that it was amenable to suit in the district court.

The exhaustion of tribal remedies doctrine is a jurisprudential rule developed by the federal courts in order to promote tribal sovereignty. The doctrine holds that when federal and tribal courts have concurrent jurisdiction, or when a tribal court has even a "colorable claim" of jurisdiction, federal courts will afford the tribal

courts the opportunity to first determine their jurisdiction. *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority,* 207 F.3rd 21, 28 (1st Cir.2000).

As ably explained by the court of appeal in this matter:

> The federal government favors and encourages tribal self-government, and in furtherance of these policies, the Supreme Court has held that a tribe whose jurisdiction has been challenged should have the first opportunity to determine the validity of such a challenge. In *Iowa* [*Mut. Ins. Co. v. LaPlante,* 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987)], the Court stated, "[r]egardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.' "This policy favors abstention by non-tribal courts to allow self-government and self-determination by Indian tribes of which tribal courts play an important role. The policy allows tribal courts to be the first to respond to an invocation of a challenge to their jurisdiction. It is prudential not jurisdictional. Therefore, it does not establish adjudicatory authority over lawsuits filed in tribal courts.

Appendix A

A tribal court's determination that it had jurisdiction is reviewable after tribal remedies have been exhausted.

* * *

Being a prudential rule, the doctrine is applied as a matter of comity. Comity is a discretionary policy where "the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign not as a rule of law but rather out of deference or respect. Courts extend immunity as a matter of comity to foster cooperation, promote harmony, and build goodwill." Unless there is an abuse of discretion by the trial court, the decision not to extend comity should not be overturned.

Meyer and Assoc., Inc. v. Coushatta Tribe of Louisiana, 2006-1542 (La.App. 3 Cir. 8/8/07) 965 So.2d 930, 934-5.

As related by the court of appeal, the United States Supreme Court has never held that the exhaustion of tribal remedies doctrine applies to the states. If we assume that the doctrine does apply to state courts, it is axiomatic that the jurisdiction of the state court must be determined prior to the doctrine's application. The doctrine applies only when a federal court (or hypothetically, here, a state court) and a tribal court share jurisdiction. The doctrine mandates that a court *with* jurisdiction allow a tribal court which may have

jurisdiction to determine its own jurisdictional question. If a state or federal court did not have jurisdiction, there would be no need to apply the doctrine. Instead, the state or federal court would decline to proceed with the case based on lack of subject matter jurisdiction. In any event, the doctrine does not mandate that tribal courts be allowed to determine whether or not non-tribal courts have concurrent jurisdiction.

Our determination that state courts are the arbiters of their own jurisdiction is bolstered by previous holdings by courts of appeal in this State. In *Ortego v. Tunica Biloxi Indians of Louisiana d/b/a Paragon Casino*, 03-1001 (La.App. 3 Cir. 2/4/04), 865 So.2d 985, *writ denied*, 04-587 (La.4/23/04), 870 So.2d 306, the court of appeal determined that the trial court did not have jurisdiction over the matter because there was no valid waiver of sovereign immunity rather than because of the tribal exhaustion doctrine. Likewise, in the case of *Bonnette v. Tunica-Biloxi Indians*, 02-919, 02-920, 02-921 (La.App. 3 Cir. 5/28/03), 873 So.2d 1, the court of appeal dismissed the suit due to the lack of a valid waiver of sovereign immunity.

For these reasons, the district court did not err in entertaining the issue of whether or not it had subject matter jurisdiction, and because the issue of the district court's subject matter jurisdiction revolved around whether the Tribe had validly waived its sovereign immunity, the district court did not err in declining to defer to the Tribal Court on that issue.

With regard to the waiver, an Indian tribe is subject to suit in state courts only where Congress has authorized the suit or the tribe has waived its immunity. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 118 S.Ct. 1700, 1702, 140 L.Ed.2d 981 (1998). Congress' authorization for suit must be unequivocal and a tribe's waiver must be clear. *C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418, 121 S.Ct. 1589, 1594, 149 L.Ed.2d 623 (2001).

Meyer has not asserted that Congress authorized the suit, rather its argument is that the Tribe unequivocally waived its immunity to the suit by means of the forum selection clauses contained in the various contracts between the parties and in the MOU's between the Tribe and the municipalities. There is no doubt that the language contained in the forum selection clauses would suffice to waive the Tribe's sovereign immunity, if the clauses are valid. The Tribe argues, however, that Chairman Poncho did not have the authority to waive the Tribe's sovereign immunity because, according to Tribal law, its sovereign immunity could only be waived by means of a Tribal Resolution or ordinance, and that no such resolution or ordinance was passed by the Tribal Council.

The Tribe relies on the following language contained in its Tribal Law:

> The Coushatta Tribe of Louisiana, as a sovereign government, is absolutely immune

> from suit, and its Tribal Counsel, judges, Appellate Judges, ad-hoc Judges, officers, agents, and employees shall be immune from any civil or criminal liability arising or alleged to arise from their performance or non-performance of their official duties. Nothing in this Code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Counsel specifically referring to such.

Title 1, § 1.1.05 of the Coushatta Judicial Code.

Meyer argues that the language of § 1.1.05 makes clear that the section does not apply to the waivers in question, but instead clarifies simply that "nothing in this [Judicial] Code" should be construed as waiving the Tribe's sovereign immunity absent a resolution or ordinance so stating, and that the Tribe's sovereign immunity naturally extends to its judicial officers.

It is a well-settled principle of statutory construction that absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language. *Cleco Evangeline, LLC v. Louisiana Tax Commission*, 01-2162, p. 5 (La.4/3/02), 813 So.2d 351, 354. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further

interpretation may be made in search of the intent of the legislature. La. C.C. art. 9. The meaning and intent of a law is determined by a consideration of the law in its entirety, and the court's construction should be consistent with the express terms of law and with the obvious intent of the lawmaker in enacting it. *Bridges v. Autozone Properties, Inc.*, 04-0814 (La.3/24/05), 900 So.2d 784, 799. The best evidence of the legislature's intent is the wording of the statute. *State v. Williams*, 00-1725 (La.11/28/01), 800 So.2d 790, 800.

Here, the Tribal Council's restriction of its wording to "[n]othing in this Code" makes clear that the codal article applies only to the language of the Code, and not to waivers extraneous to the Code. If, however, we had determined that the codal language required that the Tribal Council pass a "resolution or ordinance" in order to waive sovereign immunity, the Tribal Council passed Resolution 2003-04 authorizing the Chairman to "negotiate and execute . . . all necessary additional Agreements with Meyers and/or to execute Work Authorizations" in order to fully implement the Power Program. R. at 524. The Chairman testified that the waivers found in the various contracts and MOU's were necessary to induce the contracting entities to do business with and make substantial financial commitments to the Tribe. R. at 282.

Because the Tribe validly executed waivers of sovereign immunity and expressly subjected itself to the jurisdiction of the district court, we must now determine if the district court erred in not staying the matter to

allow the Tribal Court to determine if it had jurisdiction over the non-Indian party, and, if so, decide the merits of the case.

As stated above, the tribal exhaustion doctrine is one based in comity, a discretionary policy, and the decision whether or not to apply the doctrine is up to the discretion of the district court. Here, the merits of the case, a contractual dispute, are, according to the language of the forum selection clauses, to be "interpreted, governed and construed under the laws of the State of Louisiana," rather than by Tribal law. Next, the State of Louisiana has a major interest in contractual disputes involving its corporations and municipalities. Further, the dispute does not involve tribal governance or political integrity. Next, state courts, unlike federal courts, do not have the power to review a tribal court's exercise of jurisdiction over non-members. Finally, the district court carefully considered the arguments of both parties in reaching its decision. Given these facts, we cannot say that the district court abused its discretion.

DECREE

For the foregoing reasons, we reverse the ruling of the court of appeal, reinstate the judgment of the trial court, and remand the matter to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

CALOGERO, J., additionally concurs and assigns additional reasons.

KIMBALL, J., dissents and assigns reasons.

JOHNSON, J., dissents for reasons assigned by KIMBALL.

VICTORY, J., concurs in the result.

WEIMER, J., dissents and assigns reasons.

CALOGERO, Chief Justice, additionally concurring and assigning additional reasons:

While I agree with and subscribe to the majority opinion and its conclusion that defendant, Coushatta Tribe of Louisiana ("CTOL"), may be sued in Louisiana state court for breach of contract by plaintiff, Meyer & Associates, Inc., I write separately to express my views and cite additional authority for that finding. The "exhaustion of tribal remedies" doctrine discussed by the majority in this case applies only when a case involving a sovereign Indian Tribe has been filed in a federal court, not to state court actions. *See, e.g., Michael Minnis & Associates, P.C. v. Kaw Nation*, 90 P.3d 1009, 1014 (Ok.Civ.App.2003), citing *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). In the *Kiowa Tribe* case, a federally recognized Indian Tribe that had been sued in Oklahoma state court for default on a commercial note moved for dismissal of the case

for lack of jurisdiction. The Indian Tribe argued sovereign immunity from suit, and the United States Supreme Court dismissed the suit, finding that the Indian Tribe enjoyed "immunity from suits on contracts," and that sovereignty immunity governed the case because the tribe had not waived that immunity. 523 U.S. at 760, 118 S.Ct. 1700.

The *Kiowa Tribe* case does not even mention the exhaustion of tribal remedies doctrine in relation to a suit against an Indian Tribe filed in a state court. Based on that fact, I would find that the exhaustion doctrine does not apply in state courts. Rather, the court found that under federal law, "an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Id.* at 754, 118 S.Ct. 1700. The *Kiowa Tribe* case is therefore authority for the principle that the pertinent question when a state court suit has been filed against an Indian Tribe is whether that tribe waived its sovereign immunity.[1]

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1. In *Kiowa Tribe,* the United States Supreme Court also noted that the doctrine of tribal immunity "developed almost by accident," 523 U.S. at 755, 118 S.Ct. 1700, and that reasons exist "to doubt the wisdom of perpetuating the doctrine" for the purpose of "safeguarding tribal self-governance" in "our interdependent and mobile society." *Id.* at 758, 118 S.Ct. 1700. The court further stated its belief that in the modern economic context, "immunity can harm those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." *Id.* Nevertheless, the court indicated that despite a possible "need to abrogate tribal immunity, at least as an overarching

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The *Kiowa Tribe* case does not contain any guidance to help a court determine whether an Indian Tribe has waived its sovereign immunity. Nevertheless, authority exists for finding that a sovereign tribe has waived its sovereign immunity via a forum selection clause that is "clear, direct, and unavoidable." *Ninigret Development Corp. v. Narragansett Indian Wetuomuck Housing Authority*, 207 F.3d 21, 31 (1st Cir.2000), and authority cited therein. As the majority notes, the forum selection clause in the interim agreement at issue in this case provides that the two agreements between the plaintiff and defendant and "amendments thereto shall be interpreted, governed and construed under the laws of the State of Louisiana without regard to applicable conflict of laws provisions," that the tribe "irrevocably consents to the jurisdiction of the courts of the State of Louisiana," that "any dispute arising hereunder shall be heard by a court of competent jurisdiction in the Parish of Allen, or other Parish mutually agreed to," and that the "CTOL *specifically waives any* **rights, claims, or defenses to sovereign immunity** it may have as it relates to this Agreement except this wavier is limited at this time to Development phase Services" emphasis added). Because I believe that the forum selection clause, and particularly the provisions quoted above, constitute a "clear, direct, and unavoidable" waiver of sovereign immunity, I concur in the majority's finding that the tribe is amenable to this state court action. Accordingly, I respectfully concur in the majority opinion.

(Cont'd)
rule," it is Congress that "is in a position to weigh and accommodate the competing policy concerns and reliance interests." *Id.* at 759.

Appendix A

KIMBALL, J., dissenting.

I respectfully dissent from the majority opinion which finds (1) that the state trial court need not have stayed this matter in accordance with the federal Exhaustion of Tribal Remedies Doctrine[1] (hereinafter, the "Exhaustion Doctrine") in order to allow the Tribal Court to decide whether the Coushatta Tribe had waived its sovereign immunity, and (2) that the Coushatta Tribe waived its sovereign immunity such that it was amenable to suit in the trial court. In my view, the trial court should have stayed or dismissed this matter in accordance with the Exhaustion Doctrine because the Tribal Court should have been allowed to first determine its own jurisdiction and the question of waiver of sovereign immunity. Consequently, I do not reach the issue of whether the Tribe waived its sovereign immunity.

The issue in the instant case is whether Defendant Coushatta Tribe of Louisiana ("CTOL" or "the Tribe") waived its sovereign immunity so as to make it amenable to suit in Louisiana state court. Looking to the plain language of the contract between the Tribe and Plaintiff Meyer & Associates, Inc., ("Meyer"), the Tribe—through Chairman of the Coushatta Tribal Counsel Lovelin Poncho—clearly and unequivocally stated that "the CTOL specifically waives any rights, claims, or

1. For the purposes of this dissent, I will identify the rule by which the Supreme Court requires federal courts to exhaust tribal remedies before exercising their jurisdiction as the "Exhaustion of Tribal Remedies Doctrine."

defenses to sovereign immunity it may have."[2] Record at 113-14. The essential question to determining the issue of waiver thus necessarily turns on whether Chairman Poncho had the authority to waive the Tribe's sovereign immunity by contractual agreement.

Prior to execution of the contract, the Tribal Council passed Resolution 2003-04, which authorized Chairman Poncho to negotiate and execute all necessary agreements with Meyer and surrounding companies and municipalities as may be required to complete a power plant pursuant to the contract. However, Article 1.1.05 of the Judicial Code of the Coushatta Tribe of Louisiana, entitled "Sovereign Immunity," specifically states: "Nothing in this Code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Council specifically referring to such." Title 1, § 1.1.05, Coushatta Judicial Code. The question thus becomes (1) whether Resolution 2003-04 actually authorized Chairman Poncho to waive sovereign immunity, and (2) if it did not, whether a resolution or ordinance approved by the Tribal Council is the exclusive means of waiving sovereign immunity *in toto*, or rather the only means of waiving sovereign

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2. In addition, the CTOL-again through Chairman Poncho-agreed to "irrevocably consent to the jurisdiction of the courts of the State of Louisiana" and to try any dispute arising under the agreement in "a court of competent jurisdiction in the Parish of Allen, or any other Parish mutually agreed to." Record at 113-14.

immunity within the confines of "this Code." A determination of both questions—which will ultimately determine whether the Tribe waived sovereign immunity and whether the Tribe was therefore subject to the trial court's jurisdiction—thus rests on an interpretation of Article 1.1.05 of the Tribal Code. For the reasons set forth below, I believe that the proper court to first make this determination should be the Coushatta Tribal Court, and that the trial court should never have reached the issue of waiver.

Indian Tribes Generally Enjoy Sovereign Immunity from Commercial Disputes

As a preliminary matter, the Coushatta Tribe is generally immune from suit absent a valid waiver of its sovereign immunity. Indian tribes occupy a unique status under United States law. *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 851, 105 S.Ct. 2447, 2451, 85 L.Ed.2d 818 (1985). They are considered " 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Comm. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991). Indian tribes are "distinct, independent political communities" that retain their original natural rights regarding matters of self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55, 98 S.Ct. 1670, 1675, 56 L.Ed.2d 106 (1978). Although they no longer possess the full attributes of sovereignty, Indian tribes remain a separate people with the power to make substantive

laws to regulate their internal and societal relations and to enforce those laws in their own forums. *Id.*

While Indian tribes are predominantly autonomous entities, the power of the federal government over Indian tribes is plenary and Congress has the authority to limit, modify or eliminate the powers of local self-government that the tribes otherwise possess. *Id.* at 56, 98 S.Ct. at 1676. Nonetheless, federal law generally provides significant protection for Indian tribes' individual, territorial and political rights.[3] *National*, 471 U.S. at 851, 105 S.Ct. at 2451. Specifically, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. at 1677. Consequently, suits against Indian tribes are barred by sovereign immunity absent a clear waiver by the tribe or Congressional abrogation. *OK Tax Comm.*, 498 U.S. at 509, 111 S.Ct. at 909. *See also Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 756-58, 118 S.Ct. 1700, 1704-1705, 140 L.Ed.2d 981 (1998) (holding that Indian tribes specifically enjoy sovereign immunity from civil suits on contracts for commercial activities). It is also well settled that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. at 1677. As such, I would find that the Tribe retains its sovereign immunity absent a valid waiver thereof.

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3. This federal law is garnered from statute, treaty, administrative regulations and judicial decisions. *National*, 471 U.S. at 851, 105 S.Ct. at 2451.

However, I dissent from that part of the majority opinion that finds that the Tribe waived its sovereign immunity because, as noted below, I do not believe that the trial court should have reached this issue because I would find that the trial court is subject to the Exhaustion Doctrine.

Under Federal Law, the Coushatta Tribal Court has Jurisdiction to Determine this Dispute

The first question in an Exhaustion analysis is whether the Coushatta Tribal Court has the requisite jurisdiction to decide a case involving a non-Indian. Generally, "absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Strate v. A-1 Contractors*, 520 U.S. 438, 445, 117 S.Ct. 1404, 1409, 137 L.Ed.2d 661 (1997). Moreover, the inherent sovereign powers of an Indian tribe—those powers that a tribe enjoys apart from and in addition to those powers expressly granted by treaty or statute—generally do not extend to the activities of nonmembers. *Montana v. United States*, 450 U.S. 544, 565, 101 S.Ct. 1245, 1258, 67 L.Ed.2d 493 (1981). Nonetheless, "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations." *Id.* Specifically, a tribe may regulate the activities of (1) nonmembers who enter consensual relationships with the tribe through commercial dealings, contracts, leases or other arrangements, and (2) nonmembers whose conduct within the reservation threatens or has some direct effect on the political

integrity, economic security or health or welfare of the tribe. *Id.* at 565-66, 101 S.Ct. at 1258. In the instant case, it is undisputed that Meyer entered into a consensual, commercial and contractual relationship with the Tribe. Consequently, I would find that, under federal law, the Tribal Court has jurisdiction over Meyer in the instant case.

Under Federal Law, When a Tribal Court's Jurisdiction is Challenged, Tribal Courts First Determine Their Own Jurisdiction, Subject to Federal District Court Review

The next pertinent issue is whether the Tribal Court's jurisdiction can properly be decided by a non-Indian court. I believe that the majority incorrectly determines that the Exhaustion Doctrine is discretionary in nature. While there is technically no binding precedent on this issue regarding state courts, in my view, federal Exhaustion Doctrine jurisprudence requires that federal district courts defer first to tribal courts and allow them to determine their own jurisdiction, subject to federal district court review.

When presented with a conflict between tribal courts and federal district courts regarding the determination of a tribe's sovereign immunity and jurisdiction, the United States Supreme Court has consistently held that:

> the existence and extent of a tribal court's jurisdiction will require a careful examination of tribal sovereignty, the extent to which that

> sovereignty has been altered, divested or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decision.

National, 471 U.S. at 855-56, 105 S.Ct. at 2453-54. The Supreme Court has therefore concluded that this "examination should be conducted in the first instance in the Tribal Court itself." *Id.* at 856, 105 S.Ct. at 2454.

In support of its determination, the Court has cited several reasons for applying the Exhaustion Doctrine and requiring tribal courts to first determine their own jurisdiction. First, previous Supreme Court precedent often recognizes Congress' committal to a "policy of supporting tribal self-government and self-determination." *Id.* Congressional policy therefore favors a jurisprudential rule that "will provide the forum whose jurisdiction is being challenged the first opportunity to evaluate the factual and legal bases for the challenge." *Id.* Second, allowing tribal courts to develop a full record before a federal court addresses any issue promotes the orderly administration of justice in federal courts. *Id.* The risk of creating a procedural nightmare is therefore minimized when federal courts stay their hands until after tribal courts have had a full opportunity to determine their own jurisdiction and rectify any errors that they may have made. *Id.* at 856-57, 105 S.Ct. at 2454. Third, the exhaustion of tribal remedies encourages tribal courts to explain to the parties their precise basis for accepting jurisdiction, and

also provides other courts with the benefit of tribal court experience in tribal law matters in the event of further judicial review. Fourth, unconditional access to federal courts places such courts "in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16, 107 S.Ct. 971, 976, 94 L.Ed.2d 10 (1987) (citing *Santa Clara Pueblo*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106). Finally, because tribal courts are best qualified to interpret and apply tribal law, adjudication of such matters by "any nontribal [sic] court" also infringes upon the tribal law-making authority. *Id.*, 107 S.Ct. at 977. As such, the Supreme Court continually holds that "proper respect for tribal legal institutions requires that they be given a 'full opportunity' to consider the issues before them and 'to rectify any errors.' " *Id.*

However, the Exhaustion Doctrine is not without limit. Specifically, the **7 Supreme Court has held that exhaustion is not required (1) when an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith, (2) where the action is patently violative of express jurisdictional prohibitions, or (3) where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction. *National*, 471 U.S. at 856, 105 S.Ct. at 2454, fn. 21. Finally, when the Exhaustion Doctrine does attach, "exhaustion of tribal remedies means that tribal appellate courts must have the opportunity to review the determinations of the lower tribal courts." *Iowa*, 480 U.S. at 17, 107 S.Ct. at 977. As such, and absent any of

the aforementioned exceptions to the Exhaustion Doctrine's applicability, a federal district court is required to stay or dismiss an action when a concurrent action is pending in a tribal court until that concurrent tribal action has been decided by the tribal court and any tribal appellate courts.[4]

Therefore, in my view, the majority is incorrect when it fails to find that, in the instant case, *if* the state district court were bound by the Exhaustion Doctrine, the state district court would be required to stay or dismiss any proceedings pending a determination by the Tribal Court and subsequent Coushatta appellate courts.

Moreover, *if* the state district court were bound by the Exhaustion Doctrine, I would further find that none of the enumerated exceptions apply to this case. Meyer suggests in its brief to this court that the Tribal Court might be incompetent or biased in its adjudication, thereby implicating the first exception. However, I believe that this exception will not attach in the instant case. First, the Supreme Court has specifically stated that the "alleged incompetence of tribal courts is not among the exceptions to the exhaustion requirement." *Id.* at 19, 107 S.Ct. at 978 (the Court further stated that an incompetence exception "would be contrary to the congressional policy promoting the development of tribal

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4. "Whether the federal action should be dismissed, or merely held in abeyance pending the development of further Tribal Court proceedings, is a question that should be addressed in the first instance by the District Court." *National*, 471 U.S. at 857, 105 S.Ct. at 2454.

courts"). Second, Meyer presents no evidence of bias, and the Supreme Court has declined to permit parties to excuse themselves from the Exhaustion requirement merely by alleging bias. *Id.* Moreover, the Indian Civil Rights Act provides non-Indians with various protections against unfair treatment in the tribal courts. *Id.* (citing the Indian Civil Rights Act, 25 U.S.C. § 1302). As such, I do not believe that Meyer can escape the application of the Exhaustion Doctrine by way of the first exception.

Meyer, in an appeal to equity, also suggests that it will have no recourse if the Tribal Court is allowed to decide this case, thereby implicating the third exception. However, again, in my view, this exception will not attach in the instant case. The Supreme Court has stated with absolute clarity that the question of whether a tribal court has civil jurisdiction over a non-Indian is "one that must be answered by reference to federal law and is a 'federal question' under § 1331." *National*, 471 U.S. at 852, 105 S.Ct. at 2452. Therefore, a federal court may review the Tribal Court's decision and can determine whether the Tribal Court "exceeded the lawful limits of its jurisdiction" after the Tribal Court and subsequent Coushatta appellate courts have made their determinations.[5] *Id.* at 853, 105 S.Ct. at 2452.

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5. The federal district court's scope of review is limited by its findings regarding jurisdiction. If the federal court finds that the tribal court had jurisdiction, proper deference to the tribal court precludes re-litigation of factual issues raised in and determined by the tribal court. *Iowa*, 480 U.S. at 19, 107

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Meyer also argues that the Exhaustion Doctrine is not a mandatory jurisprudential rule, but rather an optional matter of comity. The majority opinion also cites the discretionary nature of comity as a reason for declining to apply the Exhaustion Doctrine. In support of this argument, Meyer cites in his brief a footnote in which the Supreme Court noted that exhaustion is "required as a matter of comity, not as a jurisdictional requirement." *Iowa*, 480 U.S. at 16, 107 S.Ct. at 976, fn. 8. In my view, Meyer's argument and the majority's decision that Exhaustion is a discretionary jurisprudential rule is without merit, and I would find that the Exhaustion Doctrine is mandatory for federal courts. *See, e.g., Smith v. Moffett*, 947 F.2d 442, 445 (10th Cir.1991) (relying on *Granberry v. Greer*, 481 U.S. 129, 131, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987), for the proposition that *Iowa* and *National* established the Exhaustion Doctrine as "an inflexible bar"); *Crawford v. Genuine Parts Co.*, 947 F.2d 1405, 1407 (9th Cir.1991) ("The requirement of exhaustion of tribal remedies is not discretionary; it is mandatory"). In making this footnoted statement, the *Iowa* Court connoted merely that a federal district court is not deprived of jurisdiction solely by failure to apply the Exhaustion Doctrine. *Drumm v. Brown*, 245 Conn. 657, 716 A.2d 50, 56-7 (1998). Rather, I believe that the Exhaustion

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S.Ct. at 978. If, however, the federal court finds that the tribal court lacked jurisdiction, the tribal court's factual determinations are subject to review. *Id. See also Duncan Energy Co. v. Three Affiliated Tribes of the Fort Berthold Reservation*, 27 F.3d 1294, 1300 (8th Cir.1994).

requirement means that, although the district court *has* jurisdiction over the action, it cannot *exercise* that jurisdiction until all tribal remedies have first been exhausted. *Id.* at 57. The use of the verb "required" when discussing the application of the doctrine as a matter of comity supports this contention. In essence, Exhaustion is "required" as a matter of comity; it is not "required" as a matter of jurisdiction. Regardless, it is still "required."[6] Moreover, the Supreme Court has consistently required lower federal courts to apply the Doctrine, and in its application of the Doctrine, has not suggested that Exhaustion is discretionary. *See supra. See also National,* 471 U.S. at 857, 105 S.Ct. at 2454 (holding that "exhaustion is *required* before such a claim may be entertained by a federal court") (emphasis added); *Iowa,* 480 U.S. at 16-17, 107 S.Ct. at 976 (stating that the "federal policy supporting tribal self-government *directs* a federal court to stay its hand" and that "proper respect for tribal legal institutions *requires* that they be given a 'full opportunity . . .' ") (emphasis added). Finally, the enumeration of three distinct exceptions to the Exhaustion Doctrine and the Court's refusal to expand that list strongly suggests that lower federal courts cannot decline to apply the Exhaustion Doctrine in their discretion. *National,* 471 U.S. at 856, 105 S.Ct. at 2454, fn. 21 (naming exceptions); *Iowa,* 480 U.S. at 19, 107 S.Ct. at 978 (refusing to expand the list of exceptions). If lower federal courts were allowed to

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6. The Supreme Court also likened the Exhaustion Doctrine to abstention, a similar doctrine that is also required, but not jurisdictional in nature. *Iowa,* 480 U.S. at 16, 107 S.Ct. at 976, fn. 8.

apply the Exhaustion Doctrine at their discretion as a matter of comity, the enumeration of three limited exceptions would be meaningless. Consequently, I do not believe that the Exhaustion Doctrine is as optional in nature as Meyer or the majority opinion suggests, and that federal courts are in fact required to apply Exhaustion before exercising jurisdiction.

Therefore, in the instant case, *if* the state district court were bound by the Exhaustion Doctrine, I believe that the state district court would have to either stay or dismiss the action currently before it because there is a concurrent proceeding pending in the Tribal Court. Therefore, in my opinion, the majority is incorrect to dismiss the Exhaustion Doctrine as optional in nature. Consequently, the only question remaining before this court is whether the state district court is required to apply the federal Exhaustion Doctrine.

While There is No Binding Precedent Requiring State Courts to Apply the Exhaustion Doctrine, the Courts of This State Should Apply the Doctrine

While the United States Supreme Court has never explicitly stated that state courts are subject to the federal Exhaustion Doctrine, the vast majority of jurisprudential evidence supports the conclusion that this court should find that Louisiana state courts are subject to the Exhaustion Doctrine. Previous Supreme Court decisions, the reasons behind those decisions and the arguments presented in a well-reasoned Connecticut Supreme Court case convince me that the courts of this

state should be bound by the Exhaustion Doctrine. I therefore dissent from the majority opinion that finds that Exhaustion does not apply to state courts.

Previous United States Supreme Court decisions consistently connote—often in very clear language—that state courts are subject to the Exhaustion Doctrine. In *Worcester v. State of Georgia*, the Supreme Court held that a Georgia law that forbade the Cherokee Nation from having courts was invalid. *Worcester v. State of Georgia*, 31 U.S. 515, 6 Pet. 515, 8 L.Ed. 483 (1832). Writing for the Court, Chief Justice Marshall noted that the laws of Georgia "can have no force" over an Indian tribe and that the "whole intercourse between the United States and this nation is . . . vested in the government of the United States." *Id.* (impliedly abrogated in part by *Nevada v. Hicks*, 533 U.S. 353, 361-62, 121 S.Ct. 2304, 2311, 150 L.Ed.2d 398 (2001), noting that state laws can now have some force over Indian tribes). In subsequent years, although the Supreme Court has "modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized . . . the basic policy of *Worcester* has remained." *Williams v. Lee*, 358 U.S. 217, 219, 79 S.Ct. 269, 270, 3 L.Ed.2d 251 (1959). "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them."[7]

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7. The Court also noted that Congress has expressly granted the states the jurisdiction that *Worcester* denied to (Cont'd)

Id. at 220, 79 S.Ct. at 271. In my view, the state court's action in this case has infringed on the right of the Tribe to make its own laws and be ruled by them.

Over time, the Supreme Court has become more explicit in its wording. In *Fisher v. Dist. Court of Sixteenth Jud. Dist. of Montana*, the Supreme Court stated that state court jurisdiction "plainly would interfere with the powers of self-government conferred upon the Northern Cheyenne Tribe and exercised through the Tribal Court." *Fisher v. Dist. Court of Sixteenth Jud. Dist. Of Montana*, 424 U.S. 382, 387, 96 S.Ct. 943, 947, 47 L.Ed.2d 106 (1976). Furthermore, in its *Iowa* decision, the Court plainly stated that the "federal policy favoring tribal self-government operates even in areas where state control has not been affirmatively pre-empted by federal statute." *Iowa*, 480 U.S. at 14, 107 S.Ct. at 975. In *Iowa*, the Court reaffirmed its statement in *Williams* that "the question has always been whether the state action infringed on the right of the reservation Indians to make their own

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them when Congress has wished the states to exercise such jurisdiction. *Williams*, 358 U.S. at 221, 79 S.Ct. at 271 (citing various grants of jurisdiction to the states, *e.g.*, 25 U.S.C. § 232-33, which granted New York courts broad jurisdiction over certain Indian civil and criminal affairs). In *Williams*, the Court found that there could be "no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223, 79 S.Ct. at 272.

laws and be ruled by them." *Id.* (citing *Williams*, 358 U.S. at 220, 79 S.Ct. at 271). The *Iowa* Court stated that "[a]djudication of such matters by any nontribal [sic] court also infringes upon tribal lawmaking authority, because tribal courts are best qualified to interpret and apply tribal law." *Id.* at 16, 107 S.Ct. at 977. In my opinion, the Court's use of the phrase "any nontribal [sic] court" connotes that both federal and state court adjudication of such matters would necessarily infringe on tribal sovereignty. The Court confirmed this connotation, again citing *Williams and Fisher*, when it stated that, "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." *Id.* at 15, 107 S.Ct. at 976 (citing *Fisher* and *Williams*). In this case, the state trial court purports to determine whether the Tribe has waived its sovereign immunity and whether the Tribal Court has jurisdiction to hear a case. I believe that this exercise of state court jurisdiction necessarily interferes with Tribal sovereignty and self-government and that the state court is therefore divested of jurisdiction as a matter of federal law. Finally, in its most recent case, the Supreme Court stated that "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa Tribe*, 523 U.S. at 756, 118 S.Ct. at 1703.

Therefore, based on the governing Supreme Court jurisprudence and contrary to the majority's decision, I believe that the Supreme Court contemplated that the Exhaustion Doctrine would apply to state courts as well

as federal courts. Moreover, while the Court cannot be said to have explicitly held that the Exhaustion Doctrine applies to the states under the Supremacy Clause, I would find that the five aforementioned reasons for subjecting the federal courts to the Exhaustion Doctrine enumerated by the Supreme Court in *National* and *Iowa* apply with equal force to state courts. For example, Congress' committal to a policy of supporting tribal self-government and self-determination is hindered by both federal and state court adjudication of Indian litigation. Moreover, allowing tribal courts to develop a full record before a non-tribal court addresses an issue promotes the orderly administration of justice in both federal and state courts. Also, I believe the Exhaustion Doctrine encourages tribal courts to explain the basis for accepting jurisdiction and provides reviewing courts with the benefit of tribal court experience. Furthermore, the Supreme Court has held that unconditional access to the federal forum places it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs. Certainly the same can be said of unconditional access to the state forum. *See Klammer v. Lower Sioux Convenience Store,* 535 N.W.2d 379, 381 (Ct.App.Minn.1995).[8] In the instant case, the facts prove

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8. In *Klammer,* the state district court held that exercise of its jurisdiction would not interfere with the Indian tribe's self government and would not impinge on its sovereignty, and also found that application of the Exhaustion Doctrine would deny plaintiff an opportunity to be heard in any court. *Klammer,* 535 N.W.2d at 380. Similar to the instant case, the state district

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the accuracy of this assertion: here, the state court is competing with the Tribal Court and therein impairing the latter's authority over reservation affairs. Specifically, the state court is interfering with the Tribal Court's ability to interpret its own Tribal Code. Finally, as noted above, adjudication of such matters by *any* non-tribal court—whether it be federal or state—necessarily infringes on tribal law-making authority. Consequently, even if the decisions of the Supreme Court have yet to explicitly apply the Exhaustion Doctrine to state courts, I would find that the rationale behind that Doctrine demands that this court apply Exhaustion to Louisiana state courts.

Such a decision would not be anomalous. In a well-reasoned and extensive decision, the Connecticut Supreme Court similarly decided that the Exhaustion Doctrine applies to state courts. *Drumm*, 245 Conn. 657, 716 A.2d 50 (1998). In *Drumm*, the plaintiffs were former employees of a tribe-owned casino who filed suit against the tribe in state court. *Id.* at 52. The defendants, citing the plaintiffs' failure to exhaust tribal remedies, moved

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court in *Klammer* determined the issue of tribal court jurisdiction by analyzing the tribe's sovereign immunity and interpreting for itself provisions of the tribal code, and found that the tribe in *Klammer* waived its immunity by resolution. *Id.* at 382. The court of appeal reversed the district court, applied the Exhaustion Doctrine, found that "unconditional access to state court would similarly impair the tribal court's authority," and ordered that the tribal court be given the opportunity to first evaluate its own jurisdiction. *Id.* at 381-82.

to dismiss or stay the state court proceedings. *Id.* at 54. The trial court granted the defendants' motion and dismissed the plaintiffs' action. *Id.*

The Connecticut Supreme Court found that the Exhaustion Doctrine applies to state courts. It noted that United States Supreme Court cases indicate that the doctrine is based primarily upon "respect for a substantive 'federal policy supporting tribal self-government' "that emanates from numerous federal statutes. *Id.* at 62. Although it acknowledged that the Supreme Court does not conclusively indicate whether the Exhaustion Doctrine is substantive federal law, which is binding on state courts pursuant to the Supremacy Clause, the *Drumm* court noted that there are "strong suggestions" that the Doctrine is in fact substantive in nature. *Id.* at 62-63 (citing the Supreme Court's use of mandatory language in *Iowa* and *National:* federal policy "required" Exhaustion Doctrine, federal policy "directs" abstention). The *Drumm* court also found that the Doctrine was inseparable from the federal policy and therefore probably formed an "integral, albeit interstitial and court-created, component of the law embodying federal policy supporting tribal self-government and self-determination." *Id.* at 63. Moreover, because federal common law as articulated by Court decisions is part of federal law, the *Drumm* court concluded that the Exhaustion Doctrine is likely applicable to the states. *Id.* I believe that such a conclusion is logical under the Supremacy Clause, especially given the federal law's complete domination of this area of law. Finally, the *Drumm* court held that, regardless of the Supreme

Court's intent regarding the application of the Exhaustion Doctrine to state courts, Connecticut state courts would apply the Exhaustion Doctrine out of deference and for the same reasons that the Supreme Court made the federal courts subject to Exhaustion.[9] *Id.* at 63-64. I agree, and believe that Louisiana state courts should similarly apply the Exhaustion Doctrine out of deference and for the same reasons articulated by the Supreme Court.

Therefore, whether we choose to base our decision on the highly persuasive language employed by the Supreme Court in its decisions on the matter, the reasons behind those decisions or the logical arguments presented by the *Drumm* court, in my view, the conclusion is the same: Louisiana state courts should be subject to the Exhaustion Doctrine. Consequently, I respectfully dissent from the majority's opinion that the Exhaustion Doctrine is not applicable to state courts. For this reason, I do not believe that the trial court should have reached the issue of waiver of sovereign immunity.

Conclusion

Under applicable federal law, the Coushatta Tribe enjoys sovereign immunity from suit in the instant case. Under the same federal law, the Coushatta Tribal Court has jurisdiction over Meyer to determine the issue in

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9. The *Drumm* court also cited the well recognized "plenary and exclusive [federal] power over Indian affairs" yet another reason to defer to the Supreme Court's Doctrine. *Id.*

this case. Moreover, when a tribal court's jurisdiction is challenged, like the state district court has challenged the Coushatta Tribal Court's jurisdiction in the instant case by entertaining Meyer's state court proceeding, that same federal law requires that federal district courts allow the tribal court to first determine its own jurisdiction. The primary issue, therefore, is whether the state district court should similarly be subject to the federal Exhaustion Doctrine. For the foregoing reasons, and although the United States Supreme Court does not explicitly require such, I would find that Louisiana state courts are subject to the federal Exhaustion Doctrine and that the trial court should not have reached the issue of waiver.

In my view, this case should be remanded to the trial court with an order to stay or dismiss any state court proceedings when and until the Coushatta Tribal Court and any Coushatta appellate court has rendered its decision and exhausted its judicial process.

Appendix A

WEIMER, J., dissenting.

I respectfully dissent.

The initial question in this matter is whether there was authority to include various clauses, including a waiver of sovereign immunity, in the agreement with Meyer & Associates, Inc. This question involves an evaluation of tribal law. Because I believe this threshold question involving tribal law should be resolved by the tribal court, I would find the tribal court had jurisdiction to initially determine the validity of the agreements at issue.

If the tribal court determines there was authority to effectuate the agreements, the matter can then be returned to state court.

APPENDIX B — OPINION OF THE COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT FILED AUGUST 8, 2007

COURT OF APPEAL OF LOUISIANA, THIRD CIRCUIT.

No. CW 2006-1542.

MEYER & ASSOCIATES, INC.

v.

COUSHATTA TRIBE OF LOUISIANA.

Aug. 8, 2007.

SULLIVAN, Judge.

In this writ application, the Coushatta Tribe of Louisiana (Coushatta) urges that the trial court erred in determining that it had subject matter jurisdiction in this matter and that its Tribal Court, not the trial court, should determine whether the Tribal Council's Chairman and/or his designee had authority to waive Coushatta's sovereign immunity in a series of contractual agreements. For the following reasons, we stay this matter to allow the Tribal Court to make this determination.

Appendix B

Facts

Coushatta is a federally recognized Indian tribe with its reservation located approximately three miles north of Elton in Allen Parish, Louisiana. It is governed by a Tribal Council, consisting of a Chairman and four Council members.

In 2001, Coushatta entered into a contractual relationship with Meyer and Associates, Inc. (Meyer). Meyer, a general consulting engineering firm, contracted to provide professional services to Coushatta in connection with a capital improvement program it had instituted. Their agreement was initially set forth in an Agreement for Professional Services.

On January 14, 2003, Coushatta and Meyer entered into an Interim & Definitive Supplemental Agreement to Existing Agreement for the development of a Power Program (Supplemental Agreement). In furtherance of Coushatta's stated interest in developing potential energy projects and a related industrial park to diversify its economic welfare, the Supplemental Agreement provided for the design, construction, maintenance, and operation of an electric-power-generating facility (Power Plant Project). It revised the Agreement for Professional Services in a number of respects. Thereafter, Memoranda of Agreement were executed which also amended the Supplemental Agreement. Pursuant to the terms of the contracts, Coushatta committed to invest millions of dollars in the Power Plant Project.

Appendix B

After disputes arose in the execution of these joint venture contracts, Coushatta filed suit in its Tribal Court on April 26, 2006, against Meyer and Richard T. Meyer, seeking a declaratory judgment, injunctive relief, and damages for actions arising out of these contracts. On June 6, 2006, Meyer filed suit in the Fourteenth Judicial District Court for the Parish of Calcasieu against Coushatta. Meyer then filed motions to dismiss Coushatta's suit with the Tribal Court, challenging that court's jurisdiction.

Thereafter, on July 7, 2006, Coushatta sought to stay the trial court proceedings on the basis of lis pendens and the exhaustion of tribal remedies doctrine. It also filed an Exception of Lack of Subject Matter Jurisdiction. Coushatta contended that this state court proceeding should be stayed because its suit was pending in Tribal Court before Meyer filed suit in state court and that, pursuant to the federal jurisprudential doctrine of exhaustion of tribal remedies, the Tribal Court should be allowed to determine whether or not Coushatta waived its sovereign immunity. Coushatta further asserted that the trial court did not have subject matter jurisdiction because its January 14, 2003 Resolution did not waive sovereign immunity as required by Tribal ordinance.

Meyer urged in opposition that the above-cited contract provisions waived Coushatta's sovereign immunity, that the Tribal Council representatives who signed the contracts had authority to do so, that the Tribal Court does not have jurisdiction to proceed, and

that this litigation is properly before the Fourteenth Judicial District.

At a hearing held on October 31, 2006, the trial court denied Coushatta's request to stay these proceedings on the basis of lis pendens and took the other issues under advisement. In its Reasons for Judgment, the trial court held that the exhaustion of tribal remedies doctrine does not apply to this matter and denied Coushatta's Exception of Lack of Subject Matter Jurisdiction.

Coushatta filed this writ application, urging that the trial court erred in failing to stay this proceeding to allow the Tribal Court the first opportunity to determine whether it validly waived its sovereign immunity and in finding that the trial court had subject matter jurisdiction.

Discussion

Appeal versus Writ

Meyer argues that this writ application should be denied because Coushatta has an adequate remedy through an appeal. We do not agree. If Coushatta's writ application is not considered, it must participate in these proceedings to a final judgment before it can appeal, and its defense of sovereign immunity will be effectively lost. *Guidry v. Shelter Ins. Co.*, 535 So.2d 393 (La.App. 3 Cir.1988).

Appendix B

Sovereign Immunity of Indian Tribes

Pursuant to federal law, Indian tribes are subject to suit only where authorized by Congress or the tribe has waived its sovereign immunity. *Kiowa Tribe of Ok. v. Mfg. Techs., Inc.*, 523 U.S. 751, 118 S.Ct. 1700, 140 L.Ed.2d 981 (1998). In *Kiowa*, the Court reiterated its long-held position that "[t]ribes enjoy immunity from suits on contracts, whether those contracts involve governmental or commercial activities and whether they were made on or off a reservation." *Id.* at 760, 118 S.Ct. at 1705. Unless Congress abrogates this immunity or the tribe waives it, immunity governs contractual claims against the tribe. *Id.*

An Indian tribe's waiver of sovereign immunity must be clear and express but need not employ the specific words "waive" and "sovereign immunity" to be effective. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Ok.*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). A tribe's agreement "by express contract, to adhere to certain dispute resolution procedures" and to be bound by those resolution procedures has been held to constitute an explicit waiver of sovereign immunity. *Id.* at 420, 121 S.Ct. at 1595.

At the heart of this matter are various provisions in the agreements executed by Coushatta and Meyer which they contend address sovereign immunity. The Agreement for Professional Services provided that it would be "governed by the law of the state in which the principal office of the CMC [Coushatta] is located" and

that binding arbitration would be utilized to resolve any disputes that arose with enforcement of the arbitration being enforced in the Coushatta Tribal Court.

The Supplemental Agreement was the subject of a lengthy and detailed Resolution passed by the Tribal Council the same date which authorized the Tribal Chairman "to negotiate and execute all necessary Agreements with Meyer and Associates, Inc." and "to negotiate and execute . . . all Other Agreements as may be necessary to Develop and Implement the [Power Plant Project]." It also authorized the Tribal Chairman to designate someone to act in his stead in conjunction with the Power Plant Project. The Resolution did not, however, specifically waive sovereign immunity.

The Supplemental Agreement revised the Agreement for Professional Services in a number of respects, one being that it and amendments thereto would be "interpreted, governed and construed under the laws of the State of Louisiana." In the Supplemental Agreement, the parties also "irrevocably consent[ed] to the jurisdiction" of Louisiana state courts and agreed that any dispute arising under the contract would be heard "by a court of competent jurisdiction in the Parish of Allen, or any other Parish mutually agreed to, State of Louisiana," and Coushatta "specifically waive[d] any rights, claims or defenses to sovereign immunity" with regard to the Agreement. The subsequent Memoranda of Agreement provided that, if either party had to file suit, it had to be "filed in the Fourteenth Judicial District Court, State of Louisiana."

Appendix B

Coushatta contends that it did not waive its sovereign immunity and is not subject to suit in state court because the January 14, 2003 Resolution does not satisfy its Judicial Code's requirements for waiver of sovereign immunity. Title 1, Section 1.1.05 of Coushatta's Judicial Code provides:

> The Coushatta Tribe of Louisiana, as a sovereign government, is absolutely immune from suit . . . Nothing in this code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Council specifically referring to such.

Coushatta urges that the trial court should have abstained from exercising jurisdiction and not addressed the issue of waiver of sovereign immunity in light of federal policy considerations which favor allowing tribal courts to determine whether they have jurisdiction to adjudicate matters pending before them.

Meyer urges that Coushatta waived its sovereign immunity by executing the Agreement for Professional Services, the Supplemental Agreement, and the Memoranda of Agreement and that there is no need to apply the exhaustion of tribal remedies doctrine. It contends that the trial court's judgment is correct and should be affirmed.

Appendix B

Exhaustion of Tribal Remedies Doctrine

The federal government favors and encourages tribal self-government, and in furtherance of these policies, the Supreme Court has held that a tribe whose jurisdiction has been challenged should have the first opportunity to determine the validity of such a challenge. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10 (1987); *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818 (1985). In *Iowa*, 480 U.S. at 16, 107 S.Ct. at 976 (quoting *National Farmers*, 471 U.S. at 857, 105 S.Ct. at 2454), the Court stated, "[r]egardless of the basis for jurisdiction, the federal policy supporting tribal self-government directs a federal court to stay its hand in order to give the tribal court a 'full opportunity to determine its own jurisdiction.' " This policy favors abstention by non-tribal courts to allow self-government and self-determination by Indian tribes of which tribal courts play an important role. *Nat'l Farmers*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818. The policy allows tribal courts to be the first to respond to the invocation of or a challenge to their jurisdiction. It is prudential not jurisdictional. Therefore, it does not establish adjudicatory authority over lawsuits filed in tribal courts. *Id.* A tribal court's determination that it had jurisdiction is reviewable after tribal remedies have been exhausted. *Id.*

There are exceptions to the application of the doctrine. It does not apply in situations where: "an assertion of tribal jurisdiction 'is motivated by a

desire to harass or is conducted in bad faith,' . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *Id.* at 856, 105 S.Ct. at 2454, fn. 21 (internal citations omitted). It also does not apply "[w]hen . . . it is plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana* [*v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981)]'s main rule," and the exhaustion requirement "would serve no purpose other than delay." *Strate v. A-1 Contractors*, 520 U.S. 438, 459, 117 S.Ct. 1404, 1416, fn. 14, 137 L.Ed.2d 661 (1997).

Comity

Being a prudential rule, the doctrine is applied as a matter of comity. *Nat'l Farmers*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818; *Iowa*, 480 U.S. 9, 107 S.Ct. 971, 94 L.Ed.2d 10. Comity is a discretionary policy where "the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign not as a rule of law, but rather out of deference or respect. Courts extend immunity as a matter of comity to foster cooperation, promote harmony, and build goodwill." *Levert v. Univ. of Ill.*, 02-2679, p. 11 (La.App. 1 Cir. 9/26/03), 857 So.2d 611, 618, *writ denied*, 03-2994 (La.1/16/04), 864 So.2d 635 (citations omitted). Unless there is an abuse of discretion by the trial court, the decision not to extend comity should not be overturned. *Id.*

Appendix B

The Supreme Court has not specifically held that the exhaustion of tribal remedies doctrine applies to state courts. However, the Court stated in *Iowa*, 480 U.S. at 16, 107 S.Ct. at 977 (emphasis added), that "[a]djudication of such matters *by any nontribal court* . . . infringes upon tribal law-making authority, because tribal courts are best qualified to interpret and apply tribal law."

The Louisiana Supreme Court has not addressed this issue, but prior decisions of this court appear to favor application of the doctrine where appropriate. In *Ortego v. Tunica Biloxi Indians of Louisiana d/b/a Paragon Casino*, 03-1001 (La.App. 3 Cir. 2/4/04), 865 So.2d 985, *writ denied*, 04-587 (La.4/23/04), 870 So.2d 306, a former nonmember tribal employee sued the tribe for workers' compensation benefits. The tribe filed an exception of lack of subject matter jurisdiction, arguing that the state court should abstain from deciding the issue on the doctrine of exhaustion of tribal remedies and that there was no waiver of sovereign immunity. Another panel of this court noted two factors which weighed against application of the doctrine in that proceeding: the plaintiff's claim for workers' compensation was grounded in Louisiana law, not tribal law; and, suit was initially filed with the Louisiana Office of Workers' Compensation, not in the Tunica-Biloxi tribal court. The panel determined that those circumstances did "not lend themselves to an unbending application of the doctrine of exhaustion of tribal remedies as propounded by the Supreme Court in *National Farmers Union* and *Iowa Mutual*, where

claims were pending in tribal court before suit was filed in federal court," *Id.* at 998, and concluded that the tribe's defense of tribal sovereign immunity was the appropriate basis for dismissal not exhaustion of tribal remedies. *See also, Webb v. Paragon Casino*, 03-1700 (La.App. 3 Cir. 5/12/04), 872 So.2d 641, where the findings and reasoning of *Ortego* were adopted by a second panel of this court.

Unlike *Ortego* and *Webb*, the following circumstances present here favor application of the exhaustion doctrine: 1) a contract between a tribe and a nonmember, not a Louisiana statute, is at issue; 2) the stated purpose of the contract is to provide economic support for Coushatta; 3) suit was filed first by Coushatta in its Tribal Court; and 4) interpretation and application of a tribal ordinance bears on the determination of whether the tribe waived sovereign immunity.

Courts of other states have also applied the exhaustion doctrine, finding that federal policy considerations favor application of the doctrine when suit is pending in tribal court and suit is then filed in state court. *See Teague v. Bad River Band of Lake Superior Tribe of Chippewa Indians*, 01-1256 (7/17/03), 265 Wis.2d 64, 665 N.W.2d 899; *Drumm v. Brown*, 15809 (7/28/98), 245 Conn. 657, 716 A.2d 50; and *Klammer v. Lower Sioux Convenience Store*, C6-95-279 (Minn.App.8/1/95), 535 N.W.2d 379.

Meyer assigns a number of reasons why the doctrine should not be applied here. First, it points out that the doctrine is discretionary and is prudential not jurisdictional. It also contends that the structure of the Coushatta ordinance negates the need to observe the exhaustion doctrine. It argues that the introductory phrase in the sentence, "[n]othing in this Code shall be deemed to constitute a waiver of this sovereign immunity, except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Council specifically referring to such," renders the provision illogical and without application here because it applies only to other provisions of the Judicial Code.

We agree that the sentence is not well constructed; however, we do not believe Meyer's interpretation is accurate. Furthermore, we find this argument supports application of the exhaustion doctrine to allow the Tribal Court to determine the Tribal Council's intent when it enacted the ordinance.

Meyer also argues that the Tribal Court does not have jurisdiction over it. In *Montana*, 450 U.S. at 564, 101 S.Ct. at 1258, 67 L.Ed.2d 493 (1981), the Supreme Court held that as a general rule tribal courts do not have civil jurisdiction over nonmembers, stating: "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." The Court has identified two

exceptions to this general rule. The first is a tribe's regulation "through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Id.* at 565, 101 S.Ct. at 1258. The second is a tribe's "inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566, 101 S.Ct. at 1258.

Coushatta contends that its claims against Meyer satisfy these exceptions because the contracts are a consensual relationship between it and Meyer and because it has expended a significant investment under the contracts, which has a direct effect on the economic security and/or wealth of the tribe. Meyer disagrees and argues that the choice of law and forum selection provisions of the contracts evidence that it consented to trial in the Fourteenth Judicial District Court only, not Coushatta's Tribal Court; therefore, the consensual relationship exception of *Montana* does not apply. Meyer seems to argue that Supreme Court decisions after *Montana* require that a nonmember affirmatively consent to a tribe's jurisdiction for the consensual relationship exception to apply. This argument is without merit.

In *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 121 S.Ct. 1825, 149 L.Ed.2d 889 (2001), the Supreme

Court clarified that for the consensual relationship exception to apply in the context of the imposition of a tax or regulation there must be a nexus between the consensual relationship and the tax or regulation imposed by the tribe. Accordingly, "[a] nonmember's consensual relationship in one area . . . does not trigger tribal civil authority in another." *Id.* at 656, 121 S.Ct. at 1833-34. The Supreme Court held that a nonmember hotel owner whose hotel was situated on non-Indian fee land, i.e., privately-owned land within reservation boundaries, could not be required to collect a hotel occupancy tax from its hotel guests, finding the hotel owner did not consent to collect the tax simply because he was an "Indian trader" authorized to conduct commerce with the tribe under federal law. There was no nexus between the hotel owner's consensual relationship with the tribe as Indian trader and the hotel owner's relationship with his nonmember hotel guests, which was the basis for the tax.

Atkinson reiterated that *Montana* requires only that the consensual relationship stems from "commercial dealing, contracts, leases, or other arrangements," *Montana*, 450 U.S. at 565, 101 S.Ct. at 1258, and demonstrated that the nature of the relationship with the tribe determines whether the nonmember consented to tribal jurisdiction. It does not support Meyer's argument.

Strate, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661, also does not support Meyer's position. In *Strate*, two individuals were involved in an automobile accident

on a portion of a North Dakota state highway that was situated within an Indian reservation. Neither individual was a member of the tribe whose reservation was the site of the accident. The plaintiff sued the defendant in tribal court to recover for injuries she sustained as a result of the accident. The defendant, who contracted with the tribe to perform landscape work on the reservation, filed suit in federal court seeking a judgment declaring that the tribal court did not have jurisdiction to adjudicate the matter. The Supreme Court concluded that there was no nexus between the defendant's consensual relationship with the tribe (contract to provide landscape work) and the suit by the plaintiff. The tribal court did not have subject matter jurisdiction, and the defendant did not have to wait until the those proceedings concluded to challenge that court's jurisdiction.

In *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001), the Supreme Court held that a tribal court could not assert jurisdiction over a civil rights claim under 42 U.S.C. § 1983 filed by a tribe member against a state official, who executed a search warrant on the tribe member's home with regard to suspected state law violations outside the reservation, because tribal courts are not courts of general jurisdiction and regulation of state officers in that situation was not essential to the tribe's self-government or internal relations. The Supreme Court again concluded that the tribal court did not have subject matter jurisdiction, and there was no need to adhere to the exhaustion doctrine because the only purpose it would serve was to delay the matter.

The relationships in these cases are not comparable to the relationship at issue here, and the holdings therein do not support Meyer's claims. There is a direct nexus between Coushatta and Meyer's consensual, contractual relationship and Coushatta's suit in Tribal Court which is based on that relationship. Therefore, if Coushatta did not waive its sovereign immunity, the Tribal Court has jurisdiction to adjudicate Coushatta's claims as explained in *Montana* and *Atkinson*, and it is appropriate to allow the Tribal Court to address the issue of waiver first.

Subject Matter Jurisdiction

Meyer also urges that particular provisions of the contracts, i.e., the arbitration provision of the Agreement for Professional Services and the choice of law and choice of forum provisions of the contracts Supplemental Agreement and Memoranda of Understanding, waive Coushatta's sovereign immunity. Therefore, the trial court has subject matter jurisdiction, and it is not necessary for the trial court to defer to the Tribal Court.

The exhaustion doctrine was not at issue in any of the cases cited by Meyer. Therefore, while discussion in those cases addressed the validity of waivers of sovereign immunity, they are distinguishable from this case and do not support Meyer's claim that the exhaustion doctrine should not be applied by this court.

Additionally, actual authority was not at issue in three of the cases Meyer cites in support of its position. In *C & L Enterprises*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623, the Supreme Court held that an arbitration clause which provided for enforcement of any arbitration award in accordance with the laws of Oklahoma waived sovereign immunity; however, the Court specifically noted that authority to waive sovereign immunity was not at issue. The issue in *Rush Creek Solutions, Inc. v. Ute Mountain Ute Tribe*, 03-0517 (Colo.App. Div.II 8/12/04), 107 P.3d 402, was apparent authority, not actual authority, to waive sovereign immunity, as the tribe did not have any procedure for waiving sovereign immunity, and in *Bradley v. Crow Tribe of Indians*, 02-474 (4/15/03), 315 Mont. 75, 67 P.3d 306, proof of the contract waiving sovereign immunity, not authority to waive sovereign immunity, was at issue.

In *Smith v. Hopland Band of Pomo Indians*, A093277 (1st Dist. 1/9/02), 95 Cal.App.4th 1, 115 Cal.Rptr.2d 455, a tribal chairman's authority to waive sovereign immunity was at issue, but the entire contract containing the waiver was presented to and accepted by the entire tribal council, rendering the issue of authority to waive immunity moot. Consequently, the court's lengthy discussion of other factors regarding sovereign immunity was dicta. Lastly, in *Warburton/Buttner v. Tunica-Biloxi Tribe of Louisiana*, D040158 (4 Dist. 11/26/02), 103 Cal.App.4th 1170, 127 Cal.Rptr.2d 706, the determination of waiver was made in the context of whether the plaintiff should be allowed to conduct

discovery to prepare an opposition to the tribe's exception of lack of subject matter jurisdiction, not in the context of the merits of the exception itself.

Meyer also points to the affidavits of the former Tribal Council Chairman and former Tribal Council members in which they aver that waivers of sovereign immunity were customarily included in contracts without specific resolutions authorizing them, that they had plenary power to govern Coushatta, and that they knew Coushatta had to waive its sovereign immunity to do business with nonmembers to support its position that the contracts waived Coushatta's sovereign immunity. Coushatta refutes the import of Meyer's arguments with evidence establishing that nonmembers doing business with the Tribe regularly obtained specific resolutions waiving sovereign immunity as provided in the Judicial Code. These arguments and the contradictory supporting evidence favor allowing the Tribal Court to determine whether Coushatta waived its sovereign immunity in its contracts with Meyer.

Res Judicata

Meyer urges that the Tribal Court's determinations will be res judicata as a reason for not extending comity in this matter. We do not view this as a valid reason to refuse to allow the Tribal Court the opportunity to determine whether Coushatta waived its sovereign immunity. Furthermore, as previously stated, a tribal court's exercise of jurisdiction is reviewable. *Nat'l Farmers*, 471 U.S. 845, 105 S.Ct. 2447, 85 L.Ed.2d 818.

Appendix B

Conclusions

Louisiana and its courts clearly have an interest in seeing that their citizens are protected when they contract with Indian tribes. By the same token, Indian tribes and their courts are interested in insuring that they will be able to contract with nonmember businesses for the products and services needed to sustain the tribe and to allow the tribe to grow and prosper, as evidenced by Coushatta's Power Plant Project. Unfair treatment of nonmembers in Tribal Court will discourage legitimate business concerns from doing business with Coushatta.

For the reasons discussed herein, we conclude that the doctrine of exhaustion of tribal remedies applies to the facts of this case. Therefore, we stay these proceedings to allow the Coushatta Tribal Court to determine whether Coushatta Tribe of Louisiana waived its sovereign immunity in the contracts with Meyer. If the Tribal Court determines Coushatta did not waive its sovereign immunity, proceedings will continue therein, and Meyer may seek a review of that ruling. If the Tribal Court determines Coushatta did waive its sovereign immunity, the parties can return to the Fourteenth Judicial District Court and proceed therein.

WRIT GRANTED.

APPENDIX C — WRITTEN REASONS FOR JUDGMENT OF THE 14TH JUDICIAL DISTRICT COURT FOR THE STATE OF LOUISIANA, PARISH OF CALCASIEU FILED NOVEMBER 6, 2006

14TH JUDICIAL DISTRICT COURT
STATE OF LOUISIANA
PARISH OF CALCASIEU

NO. 2006-2683

MEYER & ASSOCIATES, INC.

VS.

COUSHATTA TRIBE OF LOUISIANA

WRITTEN REASONS FOR JUDGMENT

This matter is before the Court upon a Declinatory Exception of Lack of Subject Matter Jurisdiction filed by the defendant Coushatta Tribe of Louisiana (hereinafter "CTOL"). Oral arguments were heard by the Court on October 31, 2006. Present at the hearing were counsel for Plaintiff, Richard Ieyoub, Lynn Slade, and James Moore, and counsel for Defendant, Jimmy Faircloth and Mark Vilar. The Court thereafter took this matter under advisement. The Court has carefully reviewed all memoranda, case law, and statutes submitted by the parties as well as the pleadings.

Appendix C

Facts and Procedural History

This matter involves several agreements entered into between Meyer and CTOL for the creation of an electric generating station to be jointly developed by Meyer and CTOL. This suit was filed in June 2006 by Meyer & Associates, Inc. alleging breach of contract. CTOL filed Declinatory Exceptions of Lis Pendens and, in the alternative, Lack of Subject Matter Jurisdiction. In open court, the Exception of Lis Pendens was Denied. The Exception of Lack of Subject Matter Jurisdiction was taken under advisement.

There is also a suit pending in the Tribal Court for the Coushatta Tribe of Louisiana that was filed by the CTOL against Meyer & Associates, Inc. and Richard T. Meyer requesting declaratory judgment, injunctive relief and damages arising out of the same contract at issue in the instant litigation. That suit was filed in April 2006 and is ongoing.

Law and Discussion

Under the provisions of the agreements at issue, CTOL consented to binding arbitration, waived sovereign immunity, and contractually agreed that the laws of the State of Louisiana would apply to any dispute arising under the contract. The CTOL Power Program agreements specifically state that "suit shall be filed in the Fourteenth Judicial District, State of Louisiana. . ."

Appendix C

The basis for the Exception of Lack of Subject Matter Jurisdiction filed by CTOL is that the Tribal Council which entered into the contract with Meyer did not validly waive the Tribe's sovereign immunity. CTOL is vested with sovereign immunity and is thus immune from this suit. This immunity is absolute unless abrogated by Congress or explicitly and unequivocally waived by the Tribe. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 532 U.S. 75 (1998); *Bonnette v. Tunica-Biloxi Indians*, No. 02-919 (La.App. 3 Cir. 5/28/03), 873 So.2d 1. It is CTOL's position that waiver has not been voluntarily made by the Tribe in accordance with the only procedure for waiver permitted under CTOL law — by "resolution or ordinance approved by the Tribal Council specifically referring to such." Coushatta Tribe of Louisiana Judicial Code Section 1.1.05.

Meyer argues that the United States Supreme Court has repeatedly affirmed the general rule that, absent a different congressional direction, Indian tribes lack civil authority over non-members, with two narrow exceptions. *Montana v. United States*, 450 U.S. 544, 565-566 (1982). The first exception "relates to nonmembers who enter consensual relationships with the tribe or its members"; the second exception "concerns activity that directly affects that tribe's political integrity, economic security, health, or welfare." *Strate v. A-1 Contractors*, 520 U.S. 438, 446 (1997). In this case, it is undisputed that neither Meyer & Associates, Inc. nor Mr. Meyer is a member of the Coushatta Tribe, or any other Indian tribe. Unless one of the narrow exceptions to the general

rule against tribal court jurisdiction exists, the general rule applies and the tribal court has no jurisdiction in this lawsuit. It is Meyer's position that neither exception is applicable in this matter.

The agreements clearly waived any immunity from suit in all matters relating to the agreements and expressly specified that any dispute resolution would be in the Fourteenth Judicial District Court. These agreements expressly refute and, therefore, cannot establish "consensual relationships" supporting tribal court jurisdiction under the first exception. The jurisdiction of this Court is expressly provided for, not only in the General Agreement, but also the Supplemental Agreement, Work Authorization No.2 and Work Authorization No. 3.

Meyer argues that the second exception is inapplicable as well. The United States Supreme Court in *Atkinson Trading Co., Inc. v. Shirley,* 532 U.S. 654, 657 (2001) held that "unless the drain of the nonmember's conduct upon tribal services and resources is so severe that it actually imperils that political integrity of the Indian tribe, there can be no assertion of civil authority beyond tribal lands." Meyer argues that there is no evidence that the Tribe's political integrity is in any way imperiled by the CTOL Power Program.

CTOL asserts that the "Tribal Exhaustion Doctrine" precludes the Fourteenth Judicial District Court from making a determination in this case.

Appendix C

The Court agrees with Meyer that, when tribal court jurisdiction is challenged in state or federal court, a party need not always wait until the conclusion of tribal court proceedings before seeking federal court relief from the exercise of tribal court jurisdiction. See *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

In support of its argument, CTOL points to Title 1, Section 1.1.05 of the Coushatta Judicial Code. It reads as follows:

> The Coushatta Tribe of Louisiana, as a sovereign government, is absolutely immune from suit, and its Tribal Counsel, Judges, Appellate Judges, Ad-hoc Judges, officers, agents, and employees shall be immune from any civil or criminal liability arising or alleged to arise from their performance or non-performance of their official duties. Nothing in this Code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Counsel specifically referring to such.

CTOL argues this provision places an important limitation on the authority of Tribal officials and is squarely consistent with the principle that sovereign immunity belongs to the Tribe, not to its officials.

Appendix C

Meyer counters that the Tribe convened a full Council meeting and adopted Resolution 2003-04 to authorize development of the CTOL Power Program wherein the Tribal Council resolved that the Resolution would provide the full and necessary authorization in order to fully implement the Program and expressly authorized the tribal Chairman to negotiate and execute all necessary agreements with Meyer and Associates, Inc. Further, then Tribal-Chairman, Lovelin Poncho, testified that the waivers found in Resolution 2003-04 were necessary to induce a non-member to do business with and make substantial financial commitments to CTOL.

To relinquish its sovereign immunity, an Indian tribe's waiver must be clear. C & *L Enters, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001). A waiver of sovereign immunity cannot be implied, but must be unequivocally expressed. *Ute Distribution Corp. v. Ute Indian Tribe*, 149 F.3d 1260 (10th Cir. 1998).

Meyer & Associates, Inc. is not a member of the Coushatta Tribe of Louisiana. It is a citizen and entity of Louisiana and this Court agrees that it should be afforded its rights as such. The intent of both parties is clear and unequivocally expressed in both the General Agreement and the supplemental agreements. Both sides intended for any litigation arising from the contracts to be heard in the Fourteenth Judicial District Court.

Appendix C

This Court agrees with the arguments set forth by Meyer & Associates, Inc. It appears from a review of the record that this Court has subject matter jurisdiction over this matter. Based on the foregoing, the Coushatta Tribe of Louisiana's Declinatory Exception of Lack of Subject Matter Jurisdiction will be Denied.

Thus, done and signed this, the 6th day of November, 2006, Lake Charles, Louisiana.

s/ Rick Bryant
RICK BRYANT
DISTRICT JUDGE

PLEASE SERVE ALL PARTIES.

APPENDIX D — ORDER OF THE SUPREME COURT OF LOUISIANA DENYING REHEARING DATED NOVEMBER 10, 2008

FOR IMMEDIATE NEWS RELEASE

NEWS RELEASE # 071

On the *10th day of November, 2008*, the following action was taken by the Supreme Court of Louisiana in the case listed below:

REHEARING DENIED:

2007-CC-2256 MEYER & ASSOCIATES, INC. v. COUSHATTA TRIBE OF LOUISIANA

APPENDIX E — JUDGMENT OF THE COUSHATTA TRIBAL COURT, COUSHATTA TRIBE OF LOUISIANA, ELTON, LOUISIANA (IN *CELESTINE v. COUSHATTA TRIBE OF LOUISIANA*) DATED AND FILED SEPTEMBER 5, 2006

COUSHATTA TRIBAL COURT
COUSHATTA TRIBE OF LOUISIANA
ELTON, LOUISIANA

CARLTON CELESTINE

versus

COUSHATTA TRIBE OF LOUISIANA

JUDGMENT

Defendant asserts, through an exception of lack of subject matter jurisdiction, that this court is without legal capacity to entertain plaintiff's suit. Defendant has not consented to be sued in this court. Defendant's sovereign immunity has not been waived as required by Coushatta law. For the following reasons, plaintiff's suit is dismissed with prejudice.

The essential facts are largely undisputed. On 1 April 2005, Carlton Celestine and the Coushatta Tribe of Louisiana entered into a written employment agreement. The contract provided for a two year initial term of employment. The contract further provided consequences for Celestine's discharge from employment. If the firing was without cause, Celestine

was entitled to certain benefits. If he was discharged for cause, his benefits were more modest.

Celestine, according to the Coushatta Tribe, was discharged for cause on 19 July 2005. Celestine contested the reasons for his employment termination by filing the instant suit in the Coushatta Tribal Court. He seeks a judgment recognizing that his firing was without cause and that he is entitled to damages, including monetary damages from the tribe.

The Tribe points out in the exception described above that the Tribe has never waived sovereign immunity. Tribal law on the subject of sovereign immunity is clear and specific.

> The Coushatta Tribe of Louisiana, as a sovereign government, is absolutely immune from suit, and its Tribal Council, Judges, Appellate Judges, Ad-hoc Judges, officers, agents, and employees shall be immune from any civil or criminal liability arising or alleged to arise from their performance or non-performance of their official duties. Nothing in this Code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana as expressly provided herein or as specifically waived by a resolution or Ordinance approved by the Tribal Council specifically referring to such. (Code section 1.1.05)

Appendix E

It is beyond cavil that the contract itself provides a waiver of sorts.

> For the limited purpose of enforcing this Agreement in the Coushatta Tribal Court as provided in this paragraph, the Tribe/CCR expressly waives its rights of sovereign immunity in its capacity as a federally-recognized Indian Tribe or entity owned by a federally-recognized Indian Tribe. (paragraph 11-contract)

There is however, no specific resolution or ordinance approved by the Tribal Council that waives sovereign immunity as to the employment contract with Mr. Celestine. Case law in other jurisdictions may provide for implicit waiver, but there is no Coushatta authority that trumps or refines the specific requirement for a specific ordinance or resolution.

Before we conclude, an observation is in order. The Tribe and Mr. Celestine entered into a bilateral contract. The contract, without a supporting resolution, provided enforcement rights to the contracting parties in the Coushatta Tribal Court. The Tribe now asserts its sovereign immunity rights. In other words, the opportunity to contest the contract in Tribal Court is denied. To paraphrase the words of a national leader, "Great nations, like great men, should keep their word."

Appendix E

The exception is upheld. Plaintiff's cause of action is dismissed with prejudice.

Signed at Elton, Louisiana this 5th day of September 2006.

s/ F. A. Little, Jr.
F. A. Little, Jr.
Chief Judge

APPENDIX F — RESOLUTION DATED JANUARY 14, 2003

COUSHATTA TRIBE OF LOUISIANA TRIBAL COUNCIL RESOLUTION NO. 2003-04

RESOLUTION

A Resolution authorizing the Chairman of the Council of the Coushatta Tribe of Louisiana (hereafter CTOL) to negotiate and execute all necessary Agreements with Meyer and Associates, Inc. or its assigns ("Meyer") and/or to issue Work Authorizations as may be appropriate under the existing General Agreement with Meyer all as may be required to enable the complete Development and Implementation of the Potential CTOL Power Program to include the provision by Meyer of the following services: Developer Services, Program Management Services, Preliminary Phase Services (Initial Program Management Services, Preliminary Planning, Siting Studies, Preliminary Environmental/Permitting Assessments, Fuel Supply Studies, Preliminary Power Grid Studies, Conceptual Design Services, Preliminary Feasibility Studies and Preliminary Finance/Implementation Studies and Reports), Construction Management Services Including Engineer/Procure/Construct Services (EPC) or Design/Build Services, Commissioning Phase Services and Management and Operation Phase Services for the potential CTOL Power Plant Program as deemed economically viable and feasible for the CTOL to Develop and Implement and to further authorize the Chairman to negotiate and execute the necessary Memorandums of Agreement ("MOA"), Letters of Intent

and associated Final Agreements including Power Purchase Agreement(s) with the REA Utility Company and Municipalities identified herein and/or Other Potential Power Takers or Users of Electrical Power and Other Products of the CTOL Power Program as well as any necessary Joint Development Agreements, Fuel Supply Agreements and all Other Agreements as may be necessary to Develop and Implement the CTOL.

PREAMBLE

(1) WHEREAS, the CTOL is pursuing economic development initiatives outside of the gaming industry to include potential energy projects and related industrial park development projects as part of said initiative to diversify the CTOL's investment portfolio; and

(2) WHEREAS, it is a direct objective and goal of the Tribal Council to reduce or eliminate the cost of electrical power to the Tribal Members of the CTOL as part of any development effort by the CTOL to Develop and Implement a Power Plant Program which objective will be addressed as part of the necessary feasibility studies and funding arrangements;

(3) WHEREAS, energy use for the Casino Complex was approximately 75,000,000 KWH for the two year period February, 2000 to February 2002 at a cost in excess of $6,000,000 which merits an evaluation of long-term alternative energy sources including the potential development of an energy supply facility or facilities owned by the CTOL;

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(4) WHEREAS, Valley Electric Membership Corporation ("VEMCO") has expressed an interest in obtaining power from a potential CTOL Power Plant in the event the cost of such generated electrical power is competitive to their alternatives and is based upon a long term contract and further VEMCO is currently in position to negotiate and execute a Memorandum of Agreement ("MOA") with CTOL to purchase power from the Potential CTOL Power Plant;

(5) WHEREAS, the City of Natchitoches, Louisiana ("Natchitoches") has expressed an interest in obtaining power from a potential CTOL Power Plant in the event the cost of such generated electrical power is competitive to their alternatives and is based upon a long term contract and are currently in position to negotiate and execute a MOA with CTOL to purchase power from the Potential CTOL Power Plant;

(6) WHEREAS, the City of Ruston, Louisiana ("Ruston") has expressed an interest in obtaining power from a potential CTOL Power Plant in the event the cost of such generated electrical power is competitive to their alternatives and is based upon a long term contract and are currently in position to negotiate and execute a MOA with CTOL to purchase power from the Potential CTOL Power Plant;

(7) WHEREAS, the City of Minden, Louisiana ("Minden") has expressed an interest in obtaining power from a potential CTOL Power Plant in the event the cost of such generated electrical power is competitive

to their alternatives and is based upon a long term contract and are currently in position to negotiate and execute a MOA with CTOL to purchase power from the Potential CTOL Power Plant;

(8) **WHEREAS**, preliminary investigation as part of the Phase 1 Conceptual Stage Benchmark Feasibility Assessment conducted by Meyer for the CTOL indicates the development of a CTOL Power Plant to serve the Electric Cooperative and Municipalities cited above could be a long-term, cost-effective initiative beneficial to the CTOL;

(9) **WHEREAS**, Meyer representing the CTOL has conducted preliminary discussions with the State Director of the Rural Utility Service (RUS) of the US Department of Agriculture regarding the development of this potential energy project and the RUS has fully endorsed the concept of developing this type power program to serve REA Utility Companies;

(10) **WHEREAS**, the subject REA Utility Company and Municipalities as stated above, are in an immediate position to enter into negotiation of MOA with the CTOL that would define the requirements and benefits of both parties and other Project considerations, in the development of the CTOL Power Program;

(11) **WHEREAS**, in the event the understandings, conditions and articles of agreement established in the respective MOAs are achieved by both parties, subsequent Letters of Intent and Final Agreements

including Power Purchase Agreements would be developed and conditionally executed further advancing the potential CTOL Power Program; and

(12) WHEREAS, the CTOL, due to 1) the Concept Stage Findings of the Benchmark Study Assessment; 2) preliminary meetings with the REA Utility Company and Municipalities; and 3) preliminary discussions with RUS, desires to further pursue, evaluate and develop the potential CTOL Power Program which may include a major power project serving the above cited REA Utility Company and Municipalities and/or Other Power Takers, the Casino Complex and CTOL Reservation Trust Property and as a potential alternative may also include a second separate Project serving the Casino Complex and CTOL Reservation Trust Property.

(13) WHEREAS, it may be necessary and beneficial for the CTOL to organize a separate corporate entity structure or structures to effectively Develop, Finance and Implement the CTOL Power Program.

NOW THEREFORE BE IT RESOLVED by the **Tribal Council of the Coushatta Tribe of Louisiana** that:

Section 1: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized to negotiate and execute a MOA and/or all necessary additional Agreements with Meyer and/or to execute Work Authorizations either under the existing General Agreement or any additional Agreement with Meyer to

provide the following services: Developer Services, Program Management Services, Preliminary Phase Services (Initial Program Management Services, Preliminary Planning, Conceptual Design, Siting Studies, Preliminary Fuel Supply Studies, Preliminary Power Grid Studies, Preliminary Environmental/ Permitting Assessments, Preliminary Feasibility Studies and Preliminary Finance/Implementation Studies and Reports), Construction Management Services including Engineer/Procure/Construct Services (EPC) or Design/ Build Services, Commissioning Phase Services, Management and Operation Phase Services and any Other Additional Services as may be required and necessary to fully Develop and Implement the CTOL Power Program, with the understanding that Meyer, in order to bring in the appropriate expertise in all Development Phases of the Power Program, will create through Meyer issued Subcontract Arrangements a Meyer Power Program Consortium (before and hereafter Meyer Team) consisting of Louisiana Power Group, Inc. and The Shaw Group, Inc. and/or Others as may be necessary. It is understood and agreed between CTOL and Meyer that Meyer, after completion of Preliminary Phase Services, may recommend that direct contracts, as negotiated by Meyer on behalf of the Tribe, on selected major elements be executed directly between CTOL and selected Parties of the Meyer Team or with Others with Meyer serving as sole Program Manager and Prime Construction Manager on any such direct agreements. It is further understood between CTOL and Meyer that the use of any such direct agreements are subject to the mutual agreement

between Meyer and CTOL. It is also further understood and agreed that the Agreements executed between the CTOL and Meyer shall include provisions for a structured Task Order System or Work Authorization System which will provide for the management of both the Scope of Program Services and the Schedule of the Program Services to be provided together with the management of the associated Program Budget and Costs wherein the CTOL is informed of the Program Funding and Budget process on a Task Order Basis and further the provision of Meyer Services is subject to the Special Conditions defined herein at Section 11 as applicable.

Section 2: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized to negotiate and execute MOA with VEMCO and is further authorized to negotiate and execute any resultant Letter of Intent and subsequent Final Agreements including Power Purchase Agreement (PPA) in the event it is determined, based upon the products of the MOA, and Other Considerations and Conditions defined herein including the Projected Return on Investment Criteria defined herein that it is in the best interest of the CTOL to execute said Letter of Intent and Final Agreements including the Power Purchase Agreement.

Section 3: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized to negotiate and execute MOA with Natchitoches and is further authorized to negotiate and execute any resultant Letter of Intent and subsequent Final

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Agreements including Power Purchase Agreement (PPA) in the event it is determined, based upon the products of the MOA, and Other Considerations and Conditions defined herein including the Projected Return on Investment Criteria defined herein that it is in the best interest of the CTOL to execute said Letter of Intent and Final Agreements including the Power Purchase Agreement.

Section 4: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized to negotiate and execute MOA with Ruston and is further authorized to negotiate and execute any resultant Letter of Intent and subsequent Final Agreements including Power Purchase Agreement (PPA) in the event it is determined, based upon the products of the MOA, and Other Considerations and Conditions defined herein including the Projected Return on Investment Criteria defined herein that it is in the best interest of the CTOL to execute said Letter of Intent and Final Agreements including the Power Purchase Agreement.

Section 5: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized to negotiate and execute MOA with Minden, and is further authorized to negotiate and execute any resultant Letter of Intent and subsequent Final Agreements including Power Purchase Agreement (PPA) in the event it is determined, based upon the products of the MOA, and Other Considerations and Conditions defined herein including the Projected Return on Investment Criteria defined herein that it is in the best interest of the CTOL

to execute said Letter of Intent and Final Agreements including the Power Purchase Agreement.

Section 6: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized to negotiate and execute MOA with Other Potential CTOL Power Plant Project Users or Takers and is further authorized to negotiate and execute any resultant Letters of Intent and subsequent Final Agreements including Power Purchase Agreements (PPA) in the event it is determined, based upon the products of the MOA, and Other Considerations and Conditions defined herein including the Projected Return on Investment Criteria defined herein that it is in the best interest of the CTOL to execute said Letter of Intent and Final Agreements including the Power Purchase Agreements.

Section 7: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized to negotiate and execute MOA with Potential Fuel Providers of Feedstock Fuel for the CTOL Power Plant Project and is further authorized to negotiate and execute any resultant Letters of Intent and subsequent Final Agreements including Fuel Supply Agreements in the event it is determined, based upon the products of the MOA, and Other Considerations and Conditions defined herein including the Projected Return on Investment Criteria defined herein that it is in the best interest of the CTOL to execute said Letters of Intent and Final Agreements including Fuel Supply Agreements.

Appendix F

Section 8: As part of the CTOL economic development initiative to develop land owned by the CTOL, the Chairman of the CTOL or his Designee, is hereby authorized, as part of the MOA negotiations with VEMCO, to direct Meyer, under Preliminary Phase Services, to conduct Site Master Planning for the CTOL Tract of Property currently owned by CTOL located at Interstate 49 and Route No. 6 ("Tract of Property") and to also conduct Architectural Programming and Preliminary Schematic Studies for the potential development of a Headquarters Complex and Maintenance Center for VEMCO to be sited on the subject CTOL Tract of Property. Further, the Chairman or his Designee, is authorized to negotiate and execute appropriate "build to suit" lease arrangement with VEMCO if it is determined by the Chairman or his Designee to be in the best economic interest of the CTOL.

Section 9: The Chairman of the CTOL Tribal Council or his Designee is hereby authorized to acquire land, rights-of-way and easements as may be necessary for the successful development of the Power Plant Program and to apply to the Department of the Interior and Bureau of Indian Affairs for any such property acquired to be placed in Trust with such acquisition action being subject to the applicable Special Conditions defined herein at Section 12.

Section 10: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized to make loan and grant applications to the Federal Government

and Other Public Agencies and/or Private Commercial Entities to obtain either guarantee loans, commercial loans and/or grants in amounts that may be available and to execute any and all such funding agreements provided the Special Conditions set forth in Section 12 herein are sufficiently met in the opinion of the Chairman.

Section 11: The Chairman of the CTOL Tribal Council or his Designee, is hereby authorized, working in concert with CTOL Legal Counsel and CTOL Special Legal Counsel, to organize any necessary corporate entity structures that may be required to effectively develop and finance the CTOL Power Program which may include the establishment of a separate "LLC Development Corporation" to affect project development activities and a Tribal "Special Use Corporation" (SUC) which would Own, Finance and Operate the facility. The LLC Development Corporation would terminate after completion of major contract, permit and financing activities.

The SUC would be formed by the CTOL to act as the Project Entity and would be predominantly owned by the CTOL to take advantage of financial and tax advantages, but would also provide for participation by Other Parties such as Equity Partners, etc. The Chairman or his Designee is hereby further authorized to negotiate and execute any Partner Agreements or Joint Development Agreements that may be required to Develop and Implement the CTOL Power Program.

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Section 12: It is understood that this Resolution provides the full and necessary authorization to complete all necessary Development Services, Program Management Services, Preliminary Phase Services, Construction Management Services (EPC or Design/ Build), Commissioning Services and Management and Operation Phase Services and any Other Additional Services as may be required and to execute all necessary agreements associated therewith to complete such services, in order to fully implement and place in operation the CTOL Power Plant Program subject only to the provisions of Section 1 - 11 above and to the Special Conditions listed below. It is further understood that all authorizations granted under this Resolution apply whether applied under the existing CTOL operating structure or under any newly created corporate structure or structures authorized by this Resolution.

Special Condition 1: The execution of Task Orders or Work Authorizations under the **(Safeguard Target #1)** Meyer MOA or Meyer Agreements and/or under the existing General Agreement with Meyer, shall be initially limited to the provision of Preliminary Phase Services with Expenditures for completion of the initial Preliminary Phase Services being limited to $3,375,000,

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which expenditures are not authorized without having a Memorandum of Agreement on the Purchase of Power executed and in place with the largest MW Demand Entity of the four (4) Power Entities identified herein which is VEMCO at a projected design MW demand of 190 MW, or with any other Power Entities with similar power demands as approved by the CTOL Chairman or his Designee. Upon execution of the Work Authorization for Preliminary Phase Services, a Initial Draw-down Payment representing thirty percent of the $3,375,000 is due and payable to cover Sunk Cost, Current and Immediate Future Work.

Special Condition 2: Execution of the subject Letters of Intent and various Final **(Safeguard Target#2)** Agreements identified in Sections 1 - 11 with any of the identified parties after the completion of the Preliminary Phase Services are subject to

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Sections 1 - 11 above and to the following Special Conditions 2A, 2B, 2C and 2D:

Special Condition 2A) All necessary and required financing to Develop and Implement the **(Safeguard Target#2A)** CTOL Power Program is satisfactorily in place and approved by the Commercial Lenders and all appropriate Governing Entities including the Chairman or his Designee.

Special Condition 2B) The CTOL obtaining firm executed Commitments from Equity

(Safeguard Target#2B) Partners covering any necessary Cash Equity requirements in excess of $10 million which represents the cash equity limitation to be contributed by the CTOL not including the cost of Preliminary Phase Services.

Special Condition 2C) The Projected Return on Investment made by the CTOL for the

(Safeguard Target#2C) Development and Implementation of the CTOL Power Plant Program, shall meet the

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criteria defined below as such Projected Return on Investment is confirmed by an Independent Third-Party Expert (Big 3 Accounting Firm or Other Firm or Firms) selected by the Chairman or his Designee and employed by the CTOL under separate direct agreement with such agreement costs being a part of the Total Program Development Cost.

1) Return on Investment Criteria: For Cash on Cash for Equity Contribution the CTOL requires a 12% - 15% per year return.

2) Return on Investment Criteria:

Loan Provisions and other Development Considerations This criteria will be established jointly by the CTOL and their independent Big 3 Accounting Firm upon review and analysis of the Preliminary Phase Deliverable Reports. The CTOL reserves all rights at the time of review to agree to a projected return on investment and to proceed with Phase 3 Program Activity or to modify the Program to achieve the

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investment return desired or to stop project activity and not execute any final agreements. This statement shall be included in all appropriate agreements authorized under this resolution.

(Special Condition 2D) All agreements to be executed by the CTOL shall include appropriate **(Safeguard Target#2D)** and reasonable Termination Provisions that are generally consistent with the Standards of the Power Industry for Development Programs of this type.

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CERTIFICATION

THEREFORE, the above resolution is hereby adopted by the Tribal Council, on this the 14th day of January, 2003.

s/ Lovelin Poncho
LOVELIN PONCHO, Chairman

s/ Bertney Langley
BERTNEY LANGLEY, Secretary-Treasurer

s/ Harold John
HAROLD JOHN, Member

s/ William Worfel
WILLIAM WORFEL, Vice-Chairman

s/ Leonard Battise
LEONARD BATTISE, Member

APPENDIX G — RELEVANT COUSHATTA LAWS

1.1.05 SOVEREIGN IMMUNITY

The Coushatta Tribe of Louisiana, as a sovereign government, is absolutely immune from suit, and its Tribal Council, Judges, Appellate Judges, Ad-hoc Judges, officers, agents, and employees shall be immune from any civil or criminal liability arising or alleged to arise from their performance or non-performance of their official duties. Nothing in this Code shall be deemed to constitute a waiver of the sovereign immunity of the Coushatta Tribe of Louisiana except as expressly provided herein or as specifically waived by a resolution or ordinance approved by the Tribal Council specifically referring to such.

§ 1.2.08 Authority and Laws to be Applied in the Trial and Appellate Courts

a) In cases otherwise properly before the Trial and Appellate Courts of the Coushatta Tribe, decisions on matters of both substance and procedure will be based on the following, in the following order of precedent:

1) The Constitution and Bylaws of the Coushatta Tribe (although there is no Coushatta Constitution at this time).

2) Ordinances of the Coushatta Tribe.

3) Resolutions of the Coushatta Tribe.

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4) Customs, traditions and culture of the Coushatta Tribe.

5) Laws, rules, and regulations of the Federal Government and cases interpreting such laws, rules and regulations. These federal authorities may be required to take a higher order of precedence in circumstances dictated by the Supremacy Clause of the U.S. Constitution.

6) The laws and rules of the State of Louisiana. This provision shall not be deemed to be an adoption of such laws and rules as the law of the Coushatta Tribe nor as a grant or cession to the State of Louisiana of any right, power, or authority by the Coushatta Tribe.

7) The Common Law.

b) The Courts of the Coushatta Tribe shall not recognize nor apply any federal, state, common law, rule or procedure which is inconsistent with either the spirit or the letter of either the Constitution and Bylaws of the Coushatta Tribe, or with any ordinances or resolutions of the Coushatta Tribe, unless otherwise required, in the case of Federal law only, by the Supremacy Clause of the U.S. Constitution.